(25,339)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 509.

ROBERT H. THOMPSON, ADMINISTRATOR OF THE ESTATE OF JOHN H. THOMPSON, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print
Caption	1	1
Note of filing of original petition	1	1
Amended petition	2	1
Exhibit A—Treasury circular, January 9, 1900	10	6
Demurrer to the petition	20	12
Judgment	21	12
Application for appeal	22	13
Order allowing appeal	22	13
Clerk's certificate	23	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1916.

1 In the Court of Claims.

No. 33049.

ROBERT H. THOMPSON, Administrator of the Estate of John H. Thompson, Deceased,
v.
THE UNITED STATES.

I. *Note of Filing of Original Petition.*

The original petition was filed in this case April 16, 1915. Thereafter, by leave of the court, said Robert H. Thompson filed the following

2 II. *Amended Petition.*

In the Court of Claims.

No. 33049.

ROBERT H. THOMPSON, Administrator of the Estate of John H. Thompson, Deceased,
v.
THE UNITED STATES.

Amended Petition.

Filed May 25, 1916.

To the Honorable the Court of Claims:

The claimant, Robert H. Thompson, respectfully represents:

I. He is administrator of John H. Thompson, deceased, who was a citizen of the United States and a resident of Copiah County, State of Mississippi, and was duly appointed such administrator by the Chancery Court of Lincoln, then Copiah, County, upon the petition of himself, the son of decedent, letters of administration being presented with his original petition.

II. On April 28, 1863, said John H. Thompson executed a bill of sale to the Confederate States of America for seventy-two bales of cotton then on his plantation in Copiah County aforesaid, and received therefor bonds of the Confederate States Government to the nominal value of $5,500. Said bill of sale was as follows.

"Here enter the weight of the bales only, and their marks.

"Marked on One End C. S. A.

" " The Other, J. H. T.

* * * * * * *

3 "72 Bales: Aggregate Weight 37309 at 15....$5,596.35/100

"STATE OF MISSISSIPPI,
County of Copiah:

Town or Postoffice, Pine Ridge, April 28/63.

"The undersigned having sold to the Confederate States of America, and received the value of same in bonds, the Receipt of which is hereby acknowledged, Bales of Cotton, marked, numbered and classed as in the margin, which are now deposited at His Gin House & Shed hereby agrees to take due care of said cotton whilst on his plantation, and to deliver the same at his own expense, at Brookhaven, in the State of Miss. to the order of the Secretary of the Treasury, or his Agents, or their Assigns.

J. H. THOMPSON."

"COPIAH, Apr. 28th, 1863.

"The undersigned, as Agent of the Government, certifies that the within Cotton has been examined by him or by a competent judge, and that its character will rank according to the commercial scale as Strict Middling and also, that the weights and marks are as described—the Cotton being in good merchantable order, and safely stored in a covered building.

"The undersigned certifices that the price agreed upon is a fair market price at the present time.

R. G. LATTING."

A record of said transaction was made in the Treasury Department of the Confederate States.

The cotton as above described remained in the possession of said John H. Thompson until after June 30, 1865.

III. Said bonds became utterly valueless by the surrender of the military forces of the Confederate States. While the claimant has no knowledge as to the disposition made of said bonds by said John H. Thompson, he believes that said bonds remained in the possession of said John H. Thompson from that time until after said cotton was taken from his possession, as set forth in paragraph V. Said cotton remained continuously in the possession of said John H. Thompson until it was taken as set forth in paragraph V.

IV. After the surrender of the military forces of the Con-
4 federate States, the records of the Treasury Department of said government came into the possession of the authorities of the United States and the agents of the Treasury Department were directed to collect the cotton described in such bills of sale as that set forth in par. II above, and inscribed on the records of the Treasury Department of the Confederate States, including the cotton aforesaid of said decedent, but not to take cotton to which no Confederate title or claim of title had been asserted.

V. In pursuance of such orders, in the year 1865, subsequent to June the thirtieth, there was taken from said decedent in said county by United States Treasury agents, under the provisions of the act of

Congress approved March 12, 1863, entitled "An Act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States" (12 Stat. L. 820), and acts amendatory thereof, forty-three (43) bales of cotton belonging to said decedent, the same being a part of the cotton described in par. II hereof, and said cotton was shipped to the proper United States Treasury agent and sold, and the net proceeds thereof, after deducting various expenses and costs, were placed in the Treasury of the United States, said net proceeds amounting to the sum of $3,644.60.

VI. The Chief of the Miscellaneous Division of the Treasury Department made a report to the Secretary of the Treasury November 2, 1894, which was printed as a document by the Treasury Department, No. 1730, Office of the Secretary, and officially distributed, containing among other things the following statements:

5 "Payments Made for Cotton.

We have then in the cotton fund		$14,957,478.69
Deduct from this payment made as stated in report of February 14, 1889, page 2 (the Okey report, as follows:		
Judgments under act March 12, 1863	$9,852,956.95	
Judgments against Treasury agents under act July 12, 1868	65,276.79	
Disbursed as expenses under section 3, joint resolution March 30, 1868, and subsequent acts	242,140.34	
Paid under special acts of Congress	256,766.82	
On claims allowed by the Secretary under section 5, act May 18, 1872	195,896.21	
		10,613,037.11
Leaving of the cotton fund February 14, 1889		4,344,441.58
Since that date payments have been made as follows:		
Judgment Court of Claims, Duffy, Sophia B., Report C. C., 24275	15,270.00	
Newman, John H., heirs under private act, 25 Stat., p. 1310.	32,669.20	
Briggs, Jas. M., executor C. M. Briggs, under private act, paid March 24, 1894	88,104.21	
		136,043.41
Amount in the cotton fund at this date		4,208,398.17

"Some of the judgments of the Court of Claims were for other property than cotton. They were included in the amounts above stated, but as no deduction was made above from the $1,630,038.59 received into the captured and abandoned property fund after the itemized statement made May 11, 1868, supra, for that part of that amount received from other sources than cotton, no objection should be made to thus including all the judgments, as their amounts
6 are less than those received from property other than cotton and which were not deducted.

"There is, then, only $4,208,398.17 left in the cotton fund proper. This amount is less than the balance of the fund in the Treasury derived from cotton seized after June 30, 1865, as will be seen by the following statement:

"Cotton Seized After June 30, 1865.

February 1, 1875. Secretary reports (Forty-third Congress, second session, Senate Ex. Doc. 23, p. 58) that the proceeds of cotton seized after June 30, 1865, amounted to	$4,886,671.00
Of this amount there was returned under act 1872, supra	195,986.21
Leaving (derived from cotton seized after June 30, 1865)	4,690,774.79

"The claimants under the act of 1872 had six months to present their claims. There were 1,336 claims filed for 136,148 bales—page 58, supra, or 82,510 bales more than were taken. The small amount allowed under the act of 1872 would seem to be conclusive that the cotton taken was the property of the Confederate Government and the claimants had no title to it. In addition, the records support this conclusion.

"The above showing is based entirely upon published documents, and the conclusion is inevitable that the balance of the captured and abandoned property fund in the Treasury represents the proceeds of cotton seized after June 30, 1865, which belonged to the Confederate government."

An official circular was publicly issued by the Treasury Department January 9, 1900, No. 4, Miscellaneous Division, which says as follows:

"Cotton Seized After June 30, 1865.

"Reference has been made above to Section 5, act of May 18, 1872, which authorized the Secretary of the Treasury to return the proceeds derived from cotton seized after the 30th of June, 1865.

"It appears from a report of the Secretary of the Treasury (Senate Ex. Doc. 23, page 58, Forty-third Congress, second session) that the proceeds derived from the sale of cotton seized
7 unlawfully after June 30, 1865, amounted to. $4,886,671.00
And of this amount there was returned under act of May 18, 1872 195,896.21

Leaving covered into the Treasury from this source.. $4,690,774.79

"There were 1,336 claims filed under the act of 1872 for 136,000 bales, of the estimated value of $13,600,000. (Letter of Secretary of Treasury, Ex. Doc. H. R. Forty-fifth Congress, second session, p. 36.) As before stated, only $195,896.21 was allowed by the Secretary. The claims were nearly all disallowed, for the reason that the Confederate records in this Division showed that the claimants had sold the cotton to the Confederate Government and it was not therefore individual cotton when seized after the June 30, 1865, but was the property of the Confederate Government.

"It will be noticed that the amount received from the sale of this Confederate cotton about equals the amount of the proceds of the captured cotton which remained after the payments of the judgments, etc., as above stated.

"It follows, therefore, that the balance of the fund in the Treasury received from the sale of cotton represents the proceeds of the sale of cotton that belonged to the Confederacy."

A copy of this entire circular is attached to this petition and marked Exhibit A.

VII. The cotton collected between the 1st day of June, and the 30th day of June, 1865, under said Captured and Abandoned Property Act was of very few bales and of very little value. The balance of the fund in the Treasury on March 3, 1911, received from the sale of cotton represents, except in a few scattered and isolated instances, as stated in the aforesaid official circulars, the proceeds of the sale of cotton seized after June 1, 1865, which had once been sold to the Confederate Government under bills of sale similar to that set forth in par. II hereof, for which the owner had received bonds or other valueless securities of the Confederate States, said cotton and said securi-
8 ties both remaining in the possession of the planter by whom said cotton had been sold at the time of the failure of the Confederacy and up to and including the time of the taking of the property by the United States Treasury authorities.

VIII. By the act approved March 3, 1911, entitled "An act to codify, revise and amend the laws relating to the judiciary," it is provided:

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, 1865, under the provisions of the act of Congress approved March twelfth, 1863, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and acts amendatory thereof, where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof on the judgment of said court, and full jurisdiction is given to said court, to adjudge said claims, any statutes of limitation to the contrary notwithstanding."

IX. By reason of the foregoing, the claimant is justly entitled to said net proceeds of said cotton herein claimed from the United States after allowing all just credits and offsets. No assignment or transfer of this claim, or of any part thereof or interest therein, has been

made. The claimant is a citizen of the United States. The claimant and said decedent have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, that is to say, if any such acts were committed during the late Civil War between the years 1861 and 1865, a full pardon has been granted therefor by the President of the United States.

9 And the claimant prays judgment for three thousand six hundred and forty-four dollars and sixty cents ($3,644.60).

SARGEANT PRENTISS KNUT,
Attorney for Claimant.

KING & KING,
MADDOX & GATLEY,
BARRY MOHUN,
Counsel.

DISTRICT OF COLUMBIA, *ss:*

Sargeant Prentiss Knut, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my information and belief.

SARGEANT PRENTISS KNUT.

Subscribed and sworn to before me this 24th day of May, 1916.
[SEAL.]
MARIE A. SEARLES,
Notary Public.

10 EXHIBIT "A."

Information Relative to Cotton and Captured Property Claims.

1900.

Department Circular No. 4.

Miscellaneous Division.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., January 9, 1900.

To whom it may concern:

A statement originating in Washington that there is $13,000,000 in the Treasury belonging to the cotton fund has been extensively copied in the public press, especially in the South. This publication has undoubtedly caused parties, or their descendants, who lost cotton to make inquiries. The statement is erroneous and misleading.

To correct this statement, a brief review of the transactions of the Treasury would seem proper, that parties interested and the public may not be misled by unauthorized and misleading publications.

By an act approved March 12, 1863 (12 Stat., 821), the Secretary of the Treasury was authorized to appoint special agents to collect captured and abandoned property in the States in insurrection. Nine districts were established, and an agent appointed for each. All the property collected by them that was not returned to the owners was sold, and the proceeds reported to the Secretary of the
11 Treasury. The records show that in many cases the Secretary ordered the property collected by the agents to be restored to the owners before sale, and in other cases he returned the proceeds derived from the sale to the owners.

The Treasurer of the United States was appointed a special agent, and until March 30, 1868, was the custodian of the funds. It was treated as a trust fund under the control of the Secretary.

Proceeds Covered Into the Treasury.

By a joint resolution approved March 30, 1868 (15 Stat., 251), it was provided that all the moneys derived from the sale of captured and abandoned property (which included cotton), "which have not already been actually covered into the Treasury shall immediately be paid into the Treasury of the United States."

Since the passage of the joint resolution, all the funds derived from the sale of captured and abandoned property have been covered into the Treasury, from which it cannot be taken without an appropriation by Congress. There is, therefore, no "cotton fund" in the Treasury, carried on the books as such, nor as the "captured and abandoned property fund."

Amount Derived from Captured and Abandoned Property Covered Into the Treasury.

February 4, 1888, the Register of the Treasury reported to the Secretary that the receipts of the Treasury from captured and
12 abandoned property were $26,887,584.39, and noted that in this amount was included $2,571,090.75 derived from premium on the sale of gold coin which had been received from the sale of cotton purchased by Treasury agents, and which was sold for gold. There have been no further amounts received from this source since the Register's report.

Sources from Which the Captured and Abandoned Property Fund Was Derived.

There seems to be a general impression in the country, especially among those who claim that their cotton was taken, that the captured and abandoned property fund was all derived from the sale of cotton. It is important, therefore, to state some of the sources, other than cotton, from which the fund was derived.

By the terms of the section 8, act of July 2, 1864 (13 Stat., 377), the Secretary of the Treasury was authorized to purchase cotton, and use the funds then already received from the sale of captured prop-

erty, and not then covered into the Treasury, to pay for the cotton purchased.

The profits on this transaction were $3,444,715.14. As the cotton purchased was sold for gold and the premium on the gold (which was sold) was $2,571,090.25, the captured and abandoned property fund was increased by the transaction $6,015,805.39, which amount is included in the $26,887,084.39, supra.

13 Some Other Sources of the Fund.

The report of the Secretary of the Treasury, made to Congress May 11, 1868 (Ex. Doc. 56, Senate, Fortieth Congress, second session), states the sources from which the receipts for captured and abandoned property were derived to that date, when the amount covered into the Treasury was $25,257,931.62. This report shows that there was received from other sources than the sale of cotton—

For miscellaneous property.....	$1,309,650.69
Rents	613,284.96
Sale of captured vessels, etc.....	1,438,526.39

Since this report was made there has been covered into the Treasury $1,629,652.77, which was derived from other sources than the sale of cotton taken from individuals. This sum, added to the $25,257,931.62, makes the $26,887,584.39 reported by the Register in 1888.

Amount of the Fund Covered Into Treasury that Was Received from the Sale of Individual Cotton.

To determine the amount of the captured and abandoned receipts covered into the Treasury that were derived from the sale of cotton belonging to individuals, there must be deducted from the total amount received from captured and abandoned property the amounts received from other sources:

Amount received and covered into the Treasury..		$26,887,584.39
Deduct items found above—		
Profits on cotton purchased...	$3,444,715.14	
Premium on gold.....	2,571,090.25	
Miscellaneous property.....	1,309,650.69	
Rents	613,284.96	
Sale of captured vessels, etc..	1,438,526.39	
Amount paid in since May 11, 1868	1,629,652.77	
		11,007,920.20
Leaving receipts from sale of individual cotton...		15,880,664.19

14 Included in the amount is $4,886,671 received from the sale of cotton seized after June 30, 1865, which will be noticed further along in this report.

Treasury Payments for Cotton Out of this Fund.

By the terms of section 3 of the act approved March 12, 1863 (12 Stat., 821), it was provided that "any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion prefer his claim to the proceeds thereof in the Court of Claims." It was decided officially and afterwards judicially that the rebellion closed August 20, 1866, so that the parties had until August 20, 1868, to file their claims in the Court of Claims. Under this act a large number of claims for cotton were filed in that court, and judgments rendered. It appears from the report of the Register of the Treasury, February 4, 1888, that the judgments paid amounted to $9,864,300.75. Since that date there have been paid on judgments rendered by the court and under private acts of Congress $520,700.18.

Again, under section 5, act of May 18, 1872 (17 Stat., 134) the Secretary of the Treasury returned to the owners of cotton seized unlawfully after June 30, 1865, the sum of $195,896.21.

It will thus be seen that large sums have been paid on claims for cotton under the provisions made by Congress, and these amounts should be deducted from the sum derived from its sale, in order to determine what part of the fund covered into the Treasury under the joint resolution of March 30, 1868, represents the balance derived from the sale of individual cotton.

Statement.

Amount covered into the Treasury derived from sale of individual cotton		$15,880,664.19
From this amount deduct payments judgment- Court of Claims under act of March 12, 1863, to February 4, 1888	$9,864,300.75	
Judgments of court since February 4, 1888, and private acts of Congress	520,700.18	
Disbursed as expenses under section 3, joint resolution, March 30, 1868, and subsequent acts	242,140.34	
Judgments against Treasury agents under act of July 27, 1868	65,276.79	
Claims allowed by the Secretary under section 5, act of May 18, 1872	195,896.21	
		10,888,314.27
		4,992,349.92

There is then only $4,992,349.92 left in the Treasury which was received from the sale of captured and abandoned cotton.

Cotton Seized After June 30, 1865.

Reference has been made above to section 5, act of May 18, 1872, which authorized the Secretary of the Treasury to return the proceeds derived from cotton seized after the 30th of June, 1865.

16 It appears from a report of the Secretary of the Treasury (Senate Ex. Doc. 23, page 58, Forty-third Congress, second session), that the proceeds derived from the sale of cotton seized unlawfully after

June 30, 1865, amounted to.....	$4,886,671.00
And of this amount there was returned under act of May 18, 1872.	195,896.21
Leaving covered into the Treasury from this source.....	4,690,774.79

There were 1,336 claims filed under the act of 1872 for 136,000 bales, of the estimated value of $13,600,000. (Letter of Secretary of Treasury, Ex. Doc. H. R., Forty-fifth Congress, second session, p. 36.) As before stated, only $195,896.21 was allowed by the Secretary. The claims were nearly all disallowed, for the reason that the Confederate records in this Division showed that the claimants had sold the cotton to the Confederate government, and it was not, therefore, individual cotton when seized after the June 30, 1865, but was the property of the Confederate government.

It will be noticed that the amount received from the sale of this Confederate cotton about equals the amount of the proceeds of captured cotton which remained after the payments of the judgments, etc., as above stated.

It follows, therefore, that the balance of the fund in the Treasury received from the sale of cotton represents the proceeds of the sale of cotton that belonged to the Confederacy.

17 Laws for the Relief of the Owners of Captured and Abandoned Property.

It will be seen from the foregoing that ample provision was made by law for all persons who claimed that their property was unlawfully taken.

1. Until the fund was covered into the Treasury, in 1868, the Secretary of the Treasury could return the property or the proceeds in all cases where a claim was substantiated by proper evidence.

2. The Court of Claims had jurisdiction for all claims filed before August 20, 1868.

3. The act of 1872 provided that claims for cotton could be filed with the Secretary of the Treasury until November, 1872.

Confederate Cotton Record.

The miscellaneous division has charge of all the Confederate cotton records, some of which were captured, and others purchased. It

appears from these records that the Confederate authorities burned much cotton to prevent it from falling into the hands of the Union forces. (See report of A. Roane, chief of the Confederate produce loan office to the Confederate secretary of the treasury, published in Mis. Doc. 190, H. R., Forty-fourth Congress, first session, page 39. See, also, report of De Bow, general Confederate cotton agent for Mississippi and part of Louisiana, that cotton was destroyed by Confederate scouts.) Among the Confederate treasury records is a book containing the names of persons who had made claims
18 on the Confederate treasury for cotton destroyed by their own forces, among whom was the president of the Confederacy, who made claim for 200 bales burned.

Claims Filed with the Commissioners of Claims, Commonly Called the Southern Claims Commission.

By the terms of section 2 of an act approved March 3, 1871, (16 Stat. 524), three commissioners were appointed "to receive, examine, and consider the justice and validity of such claims as shall be brought before them of those citizens who remained loyal adherents to the cause and the Government of the United States during the war, for stores or supplies taken or furnished during the rebellion for the use of the Army of the United States in States proclaimed as in insurrection against the United States." This commission came to be known as the "Southern Claims Commission." It expired by limitation of law March 10, 1880, when its last report to Congress was made. It appears from this report that there were filed with the commission 22,298 claims, amounting to $60,258,150.44, and of this amount there was allowed $4,636,920.69.

Claimants had eight years after the passage of the law to file and perfect their claims, Congress having extended from time to time the life of the commission. It appears from the report that in 5,250 cases no evidence whatever was taken by the claimants, and their claims became barred by section 5 of the act of June 15, 1878 (20 Stat., 566). These claims are not in this Department, but remain in the files of the House of Representatives.

19 The creation of this commission is another evidence, in addition to those before noted, of the liberality of Congress in providing a tribunal to adjudicate the claims of loyal citizens whose property was taken by the Union forces in the States in insurrection.

The Treasury Department has now no authority to consider and settle cotton and war claims, and relief, if any, must be afforded by Congress.

H. A. TAYLOR,
Assistant Secretary.

20 III. *Demurrer to the Petition.*

Filed May 25, 1916.

Court of Claims of the United States.

No. 33049.

ROBERT H. THOMPSON, Administrator of the Estate of John H. Thompson, Deceased,
v.
THE UNITED STATES.

Defendant demurs to the petition in the above-entitled case, for the reason that it does not set forth facts showing a cause of action against the United States.

HUSTON THOMPSON,
Assistant Attorney General.

W. F. NORRIS, *Attorney.*

21 IV. *Judgment of the Court.*

In the Court of Claims.

No. 33049.

ROBERT H. THOMPSON, Administrator of the Estate of John H. Thompson, Deceased,
v.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 29th day of May, 1916, judgment was ordered to be entered as follows:

This case coming on to be heard was submitted upon the amended petition of the claimant filed on May 25, 1916, and the demurrer thereto filed by the defendants, on consideration whereof the court is of opinion that the demurrer should be sustained. It is therefore Ordered, Adjudged, and Decreed that the defendant's demurrer to said amended petition be and the same is hereby sustained. And the claimant refusing to further plead in the cause, It is Ordered that the said petition be dismissed.

By THE COURT.

22 V. *Application for and Allowance of Appeal.*

In the Court of Claims.

No. 33049.

ROBERT H. THOMPSON, Administrator of the Estate of John H. Thompson, Deceased,
v.
THE UNITED STATES.

From the judgment rendered in this cause on the 29th day of May, 1916, the claimant makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

SARGEANT PRENTISS KNUT,
Attorney for Claimant.
GEORGE A. KING, *Of Counsel.*

Presented in open Court May 29, 1916.

In this case the claimant's application for an appeal from the judgment of this court to the Supreme Court of the United States was submitted by Mr. George A. King for the claimant, and it was thereupon Ordered, in open court, that the same be allowed.

By THE COURT.

23 In the Court of Claims.

No. 33049.

ROBERT H. THOMPSON, Administrator of the Estate of John H. Thompson, Deceased,
v.
THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the demurrer to the petition, of the judgment of the court, and of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the seal of the Court of Claims this 5" day of June, A. D. 1916.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 25,339. Court of Claims. Term No. 509. Robert H. Thompson, administrator of the estate of John H. Thompson, deceased, appellant, vs. The United States. Filed June 6th, 1916. File No. 25,339.

TABLE OF CONTENTS.

PAGE

I. Statement of case 1
II. Assignments of error 4
III. Brief of argument 4
I. Loyalty 5
The statutes 5
The practice 6
The judicial decisions 7
Defendants' authorities 14
Conclusion on loyalty 19
II. Title 19
(1) Decedent had a valid title 20
The *Whitfield* case 20
The true rule of sale 22
(2) This defense waived 29
Rule of interpretation 29
Outline of argument 30
(1) No other claims 31
(2) Public notice 36
(3) The act a nullity as construed . . 37
(4) Contemporaneous favor 39
(5) Purpose of Congress 40
Presumption of intelligent action . 41
Presumption of effective action . . 44
(6) A reasonable interest 46
(7) The language of the act 51
Conclusions 52
Appendices:
A. Opinion of the Court of Claims in the case of *Lincoln* v. *United States*, 49 C. Cls. 300 . . 55
B. Opinion of the Court of Claims in the case of *Lincoln* v. *United States*, 50 C. Cls. 70 . . 74
C. Extract from "Men and Measures of Half a Century," by Hugh McCulloch 101

D. Extract from "After the War: A Southern Tour," by Whitelaw Reid 102
E. Extracts from Official Regulations, etc., Treasury Department:
June 27, 1865 106
August 4, 1865 107
August 18, 1865 108
October 20, 1865 109
F. Extract from "Civil War and Reconstruction in Alabama," by Walter L. Fleming . . 109

TABLE OF AUTHORITIES.

PAGE
Adams *v.* United States, 2 C. Cls. 70; 7 Wall. 463 . 47
Armstrong *v.* United States, 13 Wall. 154 . . . 10, 11
Arnold *v.* Delano, 4 Cush. (Mass.) 33 26
Austin *v.* United States, 155 U. S. 419 16–17
Bailey *v.* Commonwealth, 11 Bush. (Ky.) 688 . . 45
Bell *v.* Moss, 5 Whart. (Pa.) 189 26
Benjamin on Sales 23
Bloxam *v.* Sanders, 4 B. & C. 941 25
Carlisle *v.* United States, 16 Wall. 147 . . . . . 4, 11
Ex parte Chalmers, L. R. 8 Ch. 839 25
Chase, Chief Justice Salmon P., cited by W. Reid . 40
Chesapeake & Potomac Telephone Co. *v.* Manning, 186 U. S. 238 41
Clark *v.* Draper, 19 N. H. 419 26
Conrad *v.* Fisher, 37 Mo. App. 352 26
D'Aquila *v.* Lambert, 2 Eden, 75 25
Davie *v.* United States, 10 C. Cls. 604 35
Dodsley *v.* Varley, 12 A. & E. 632 25
Erskine *v.* Nelson Co. 4 N. Dak. 66 . . . . . 42, 43
Fleming, Walter L., "Civil War and Reconstruction" 40, 109
Flint Plank Road Co. *v.* Woodhull, 25 Mich. 99 . . 41
Ex parte Garland, 4 Wall. 333 13–14

Gooch *v.* United States, 15 C. Cls. 281 32
Grant, Ulysses S., cited by Gen. Schofield 39
Grice *v.* Richardson, L. R. 3 App. Cas. 319 . . 24, 25
Griffiths *v.* Perry, 28 L. J. Q. B. 204; 1 E. & E. 680 25
Gunn *v.* Balckow, L. R. 10 Ch. App. 491 25
Haskell *v.* Rice, 11 Gray, 240 26
Hawkins *v.* United States, 12 C. Cls. 181; 96 U. S. 689 47
Haycraft *v.* United States, 22 Wall. 81 . . . . . 14, 15
Hodges *v.* United States, 18 C. Cls. 700 12
Howard Association's Appeal, 70 Pa. St. 344 . . 45, 46
Jones *v.* Brown, 2 Ex. 332 42
Knote *v.* United States, 95 U. S. 149 15
Lincoln *v.* United States, 49 C. Cls. 300; 50 C. Cls. 70 . . . . . 1, 3, 4, 26, 27, 38, 49, 50, 51
McCulloch, Hugh, "Men and Measures," &c. . . . 101
McElwee *v.* Metropolitan Co. 69 Fed. 302 26
McLean *v.* United States, 226 U. S. 374 36
McLeod *v.* Callicott, 16 Fed. Cas. 295 33
Mason *v.* Lickbarrow, 1 H. Bl. 357 25
Medbury *v.* United States, 173 U. S. 492 36
Miles *v.* Gorton, 2 C. & M. 504 . . . . . 23, 24
Milliken *v.* Warren, 57 Me. 46 26
Mitchell *v.* United States, 21 Wall. 350 47
Moore *v.* United States, 7 C. Cls. 356 35
Moses *v.* Rasin, 14 Fed. 772 26
New York Indians *v.* United States, 170 U. S. 1 . . 31
Nichols *v.* Halliday, 27 Wis. 406 45
Northey *v.* Field, 2 Esp. 613 25
Officers of South Carolina Troops *v.* United States, 20 C. Cls. 18 13
Osborn *v.* United States, 91 U. S. 474 16
Padelford *v.* United States, 4 C. Cls. 316; 9 Wall. 533 . . . . . 4, 7, 8
Page *v.* Cowasjee, L. R. 1 P. C. App. 127 25
Pargoud *v.* United States, 13 Wall. 156 10
Potter's Dwarris on Statutes 44

Protector, The, 12 Wall. 700 27
Reed *v.* Goldneck, 112 Mo. App. 310 46
Regina *v.* Wattford, 9 Q. B. 635 42
Reid, Whitelaw, "After the War" . . 40, 48, 102–106
Robinson *v.* Morgan, 65 Vt. 37 26
Rushville *v.* Rushville Gas Co. 132 Ind. 575 . . . 45
Schillinger *v.* United States, 24 C. Cls. 278; 155 U. S. 163 47
Schofield, Lieut. Gen. John M. 39
Schwab, John Christofer, "The Confederate States of America" 32
Simmons *v.* California Powder Co. 7 Colo. 255 . . 45
Smith, Ernest A., "History of the Confederate Treasury" 32
Smith *v.* Townsend, 148 U. S. 490 . . . . . 29, 40
Sprott *v* United States, 20 Wall. 459 21
Sykes *v.* United States, 8 C. Cls. 330 34
Tayloe *v.* United States, 5 C. Cls. 701 35
Townley *v.* Crump, 4 A. & E. 58 24
Treasury Department Circular, No. 4, January 9, 1900 37
Treasury Department Division Report, No. 1730, November 2, 1894 37
Tuthill *v.* Skidmore, 124 N. Y. 148 25–26
United States *v.* Klein, 13 Wall. 128 . . . . 4, 8, 9–10
United States *v.* Realty Co. 163 U. S. 427 47
United States *v.* Ross, 92 U. S. 281 12
United States *v.* Villalonga, 23 Wall. 35 . . . . 12, 28
Unity *v.* Burrage, 103 U. S. 447 44
Vogelsang *v.* Fisher, 128 Mo. 386 26
White *v.* United States, 19 C. Cls. 436 12–13
White *v.* Welsh, 38 Pa. St. 396 26
Whitfield *v.* United States, 11 C. Cls. 444; 92 U.S. 165 . . . . . 4, 20–22, 28, 32, 36, 49, 51, 52, 53
Winter *v.* Jones, 10 Ga. 190 46
Woodland Co. *v.* Mendenhall, 82 Minn. 483 . . . 26

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

ROBERT H. THOMPSON, *Administrator of John H. Thompson, deceased, Appellant,*

vs.

THE UNITED STATES.

No. 184.

APPEAL FROM THE COURT OF CLAIMS.

I. STATEMENT OF CASE.

This is a claim against the United States under section 162 of the Judicial Code of March 3, 1911, 36 Stat., 1139, for the proceeds in the United States Treasury of cotton taken by Treasury agents in Mississippi in 1865, after June 1. A demurrer to the petition was sustained. No opinion was filed in this case, but it is ruled by the opinions in the case of *Lincoln* vs. *United States,* 49 C. Cls., 300; 50 C. Cls., 70. These opinions are attached to this brief as Appendix "A," *post,* pp. 55-74, and Appendix "B," *post,* pp. 74-100.

Section 162, under which the action is brought, is as follows:

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those

whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled 'An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

The allegations of the petition may be summarized as follows:

1. Claimant's decedent, while resident in Copiah County, Mississippi, on December 28, 1863, made a bill of sale to the Confederate States of seventy-two bales of cotton on his plantation and received Confederate bonds of the nominal value of $5,500. The bill of sale acknowledged receipt of the bonds, and decedent agreed to take care of the cotton "now deposited at his gin house and shed" and to deliver it to the order of the secretary of the treasury of the Confederate States. (Rec., p. 1, par. II.)

2. The cotton remained in the possession of decedent until taken by the United States, as afterward set forth. The bonds became utterly valueless by the surrender, and the claimant avers his belief that they remained in the possession of decedent until the cotton was taken by the United States. (Rec., p. 2, par. III.)

3. The transaction of the Confederate government was recorded in the books of the Confederate treas-

ury department, which came into the possession of the United States after the surrender. United States Treasury agents were directed to collect the cotton described in such bills of sale, as shown in these books. They collected forty-three bales of cotton from decedent, being a part of the cotton described in the bill of sale. The net proceeds of this cotton are in the Treasury of the United States, amounting to $3,644.60. (Rec., pp. 2-3, pars. IV, V.)

4. Public official notice was given by the Treasury Department, in 1894 and again in 1900, that the balance of the fund in the Treasury received from the sale of cotton represents the sale of cotton seized after June 30, 1865, which belonged to the Confederate government. (Rec., pp. 3-5, par. VI; Exhibit A, Rec., pp. 6-11.) The balance of this fund remaining in the Treasury on March 3, 1911, except in a few scattered and isolated instances, was the proceeds of cotton seized after July 1, 1865, once sold to the Confederate government under bills of sale similar to that appearing in this case, the cotton and the valueless bonds remaining in the vendor's possession until the cotton was taken by the United States authorities. (Rec., p. 5, par. VII.)

5. The claimant and decedent have at all times borne true allegiance to the government of the United States and have never aided or abetted rebellion; "that is to say, if any such acts were committed during the late Civil War between the years 1861 and 1865, a full pardon has been granted therefor by the President of the United States." (Rec., p. 6, par. IX.)

The demurrer and judgment (Rec., p. 12) do not show their grounds. The opinions in *Lincoln* vs.

United States (*post*, pp. 55-100) disclose the points at issue. The United States asserts—

1. That allegation and proof of loyalty in fact during the Civil War are necessary under sections 159 and 160 of the Judicial Code.

2. That decedent had no title to the cotton when taken and therefore can not recover the net proceeds.

The Court of Claims has decided in favor of the claimant on the first issue (*Lincoln* vs. *United States*, 49 C. Cls., 300, *post*, pp. 55-74) upon the authority of this court in *Padelford* vs. *United States*, 9 Wall., 533; *United States* vs. *Klein*, 13 Wall., 280; *Carlisle* vs. *United States*, 16 Wall., 147, and has decided against the claimant upon the second issue (*Lincoln* vs. *United States*, 50 C. Cls., 70, *post*, p. 74) upon the authority of this court in *Whitfield* vs. *United States*, 92 U. S., 165.

II. ASSIGNMENTS OF ERROR.

Appellant says that the Court of Claims erred:

1. In dismissing the amended petition of the claimant upon the demurrer of defendants thereto;

2. In not holding that claimant's amended petition sets forth facts showing a cause of action against the United States.

3. In not holding that claimant had title to the cotton sufficient to sustain the action herein, notwithstanding the sale to the Confederate government aforesaid.

III. ARGUMENT.

The two issues upon loyalty and title to the cotton will be considered separately.

(*I*) *Loyalty.*

The Statutes.

The sections of the Judicial Code relied on by defendants below are as follows:

"Sec. 159. The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney.

"Sec. 160. The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed."

These provisions first appeared as a proviso to Section 12 of the act of March 3, 1863, 12 Stat. 767, reorganizing the Court of Claims, as follows:

"*Provided, however,* That in order to authorize the said court to render a judgment in favor of any

claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant and the original and every prior owner thereof where the claim has been assigned has at all times borne true allegiance to the Government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, which allegations may be traversed by the Government, and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed."

This provision was carried into the Revised Statutes of 1874 as Section 1072, in exactly the form in which it now appears in the later revision of March 3, 1911, the Judicial Code, as Section 159.

On March 12, 1863, an act was approved allowing suits to be brought in the Court of Claims for the net proceeds of captured and abandoned property. This act contained the following provision, Section 3, 12 Stat. 820:

"And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

The Practice.

Every claimant in any kind of claim appearing before the Court of Claims in the years immediately

following the passage of these two acts was obliged to allege and prove the facts required by the act of March 3, 1863. Every claimant under the captured and abandoned property act was under the special obligation of alleging and proving the facts required by the act of March 12, 1863. Many suits were brought under the latter act, and the uniform practice of the Court of Claims, until the decision of this court at the December term, 1869, in *United States* vs. *Padelford,* 9 Wall., 531, was to render judgment only upon proof of the claimant's loyalty.

The Judicial Decisions.

In *Padelford* vs. *United States,* 4 C. Cls., 316, the claimant, a northern man residing in Savannah, subscribed $2,000 to a Confederate loan, but otherwise rendered no aid or comfort to the Civil War. The Court of Claims held that his subscription was involuntary, because under fear of violence, and rendered judgment in his favor under the act of March 12, 1863, for the proceeds of cotton in the Treasury. The United States appealed to this court, which overruled this ground of decision. But the Court of Claims had also found that the claimant had taken the oath of allegiance after his cotton was taken; that he had faithfully kept the oath; and that he was therefore within the provisions of the proclamation of pardon issued by President Lincoln on December 8, 1863 (13 Stat. 737). This court said of this (9 Wall., p. 542):

"Now, we have already seen that at the time when the petitioner took the prescribed oath no right of any third party had intervened; for even if it could

be admitted that a right of the government derived from capture is an intervening right of a third person within the meaning of the proclamation, it is certain that no such right accrued to the government until actual seizure, which was after the pardon had taken full effect. In the case of *Garland* (4 Wall., 333) this court held the effect of a pardon to be such 'that in the eye of the law the offender is as innocent as if he had never committed the offense;' and in the case of *Armstrong's Foundry* (6 Wall., 766) we held that the general pardon granted to him relieved him from a penalty which he had incurred to the United States. It follows that at the time of the seizure of the petitioner's property he was purged of whatever offense against the laws of the United States he had committed by the acts mentioned in the findings, and relieved from any penalty which he might have incurred. It follows further that if the property had been seized before the oath was taken, the faith of the government was pledged to its restoration upon the taking of the oath in good faith. We can not doubt that the petitioner's right to the property in question, at the time of the seizure, was perfect, and that it remains perfect, notwithstanding the seizure."

Congress then passed a provision in the appropriation act of July 12, 1870 (16 Stat. 235; printed also, 13 Wall., 133), declaring that no pardon or amnesty granted by the President, whether general or special, should be admissible in evidence on the part of a claimant in the Court of Claims, to establish his right to bring suit therein.

At that time there was pending before this court the case of *United States* vs. *Klein*, reported in 13 Wall., 128, wherein the appellee relied upon the Presidential pardon as proof of loyalty. The Attorney General moved that the case be remanded to the

Court of Claims to be dismissed for want of jurisdiction, as required by the last cited act.

This court thereupon reviewed the various proclamations of pardon, including those of December 8, 1863 (13 Stat. 737); March 26, 1864 (13 Stat. 741); May 29, 1865 (13 Stat. 758); September 7, 1867 (15 Stat. 699); July 4, 1868 (15 Stat. 702); and December 25, 1868 (15 Stat. 711), the last an unconditional pardon without reservation of all who had participated in the war, with the restoration of rights of property.

The court repeated the doctrine of the earlier case already cited, that the effect of the pardon could not be limited by Congress and that the proclamations of pardon were valid exercises of the constitutional power of the President, and made the following statement in regard to the rights of claimants to plead their pardons (13 Wall., 142):

"We conclude, therefore, that the title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an

equivalent. 'Pardon and restoration of political rights' were 'in return' for the oath and its fulfillment. To refuse it would be a breach of faith not less 'cruel and astounding' than to abandon the freed people whom the Executive had promised to maintain in their freedom."

It concluded by declaring the act of 1870 an infringement by the legislative branch of the Government upon the constitutional powers of the other branches, using the following language (p. 148):

"Now, it is clear that the legislature can not change the effect of such a pardon, any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end."

This was followed by the decisions in the cases of *Armstrong* vs. *United States,* 13 Wall., 154, and *Pargoud* vs. *United States,* 13 Wall., 156. In the former case the court said (p. 155):

"We have recently held, in the case of the *United States* v. *Klein,* that pardon granted upon conditions blots out the offense, if proof is made of compliance with the conditions; and that the person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within 'two years after the suppression of the rebellion.' The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all

courts of the United States are bound to take notice, and to which all courts are bound to give effect. The claim of the petitioner was preferred within two years. The Court of Claims, therefore, erred in not giving the petitioner the benefit of the proclamation."

In the latter case the language used was as follows (p. 157):

"We have recently decided, in the case of *Armstrong* v. *United States,* that the President's proclamation of December 25, 1868, granting pardon and amnesty unconditionally and without reservation to all who participated, directly or indirectly, in the late rebellion, relieves claimants of captured and abandoned property from proof of adhesion to the United States during the late civil war. It was unnecessary, therefore, to prove such adhesion or personal pardon for taking part in the rebellion against the United States."

In *Carlisle* vs. *United States,* 16 Wall., 147, the court said (p. 153):

"After these repeated adjudications it must be regarded as settled in this court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows whether we regard the pardon as effacing the offense, blotting it out, in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion, during the rebellion, to the United States."

Acting under these decisions, the Court of Claims thereupon rendered judgment in favor of the claimants in the remaining cases under the act of March 12, 1863, without further proof of loyalty than the pardon of the President. This was accepted as the law under which all adjudications of the Court of Claims and this court were made under the act of March 12, 1863, up to and including the final disposition of such claims, the last being *Hodges* vs. *United States,* 18 C. Cls., 700.

Many cases under the same statute involving other questions came before this court after the cases cited, but the principle involved in these decisions was never questioned. (See *United States* vs. *Villalonga,* 23 Wall., 35; *United States* vs. *Ross,* 92 U. S., 281.)

These decisions were made under the loyalty provision in the act of March 12, 1863 (*ante,* p. 6). During all this time section 12 of the act of March 3, 1863 (*ante,* pp. 5-6) was also in force. That is the statute now embodied in sections 159 and 160 of the Judicial Code (*ante,* p. 5). The Court of Claims never made any discrimination between the two statutes but treated the decisions of this court quoted as applicable to both. This obviously correct course was not questioned. In *White* vs. *United States,* 19 C. Cls., 436, that court said (p. 440):

"Since the decisions of the Supreme Court in the Armstrong and Pargoud Cases, already cited, this court has not required claimants to aver and prove their loyalty, although the language of the Revised Statutes is that they shall set out in their petition that they have *at all times* borne true faith and allegiance to the United States, and have not given aid and comfort to *rebellion* in general, while the loyalty

to be proved under the captured or abandoned property act to which those decisions referred, and the disloyalty pardoned by the proclamation of general amnesty, related to the late rebellion only.

"The reason that claimants are thus relieved from the requirement of the Revised Statutes as to proof of loyalty is that it is understood that the word rebellion as there used practically, so far as the past is concerned and until something happens, if ever, to which it may apply again, must refer to the late rebellion only; and for disloyalty in that rebellion all citizens have been pardoned, and their disabilities to sue in this court are thereby removed."

The same doctrine was applied to a corporation in *Officers of South Carolina Troops* vs. *United States,* 20 C. Cls., 18.

The principle here applied was the same as that first declared in this court in *Ex parte Garland,* 4 Wall., 333. The petitioner in that case was a member of the bar of the Supreme Court of the United States who had followed his State into the Confederacy and served in its Congress. In January, 1865, Congress passed an act providing that no one should appear as an attorney in the Supreme Court unless he should take an oath that he had never given aid to persons engaged in armed hostility to the United States or held office under any authority in hostility to the United States. Garland presented a pardon and asked to be heard as an attorney in the Supreme Court notwithstanding this act and the rule of court passed in pursuance thereof. The court granted his petition, saying (p. 380):

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender;

and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

The petitioner afterward became a Senator and Attorney General of the United States. Had any question arisen as to the salary or allowances due him in these offices, he would have been unable, upon the present theory of the United States, to present a petition in his own behalf for relief in the Court of Claims, although his service to the Confederacy would not have prevented his appearing as attorney for some other petitioner.

The Court of Claims treated these cases as conclusive on the issue of loyalty. Their opinion in favor of claimant is Appendix A, *post*, pp. 55-74.

Defendants' Authorities.

We may venture to refer here to some cases cited by defendants below which may perhaps be cited here. These are all considered in the opinion of the court below, *post*, pp. 55-74.

In *Haycraft* vs. *United States*, 22 Wall., 81, suit was brought by a pardoned owner of cotton within six years of the taking, but more than two years after the close of the war, the limit fixed in the act of March 12, 1863 (*ante*, p. 6). This was on the theory that upon the original taking of the cotton an implied contract arose to pay the owner for it. This court said (pp. 92-95) in effect:

(a) That there was no jurisdiction of this suit

under the act of March 12, 1863, because it was brought after the period allowed by that act;

(b) That this cotton was taken by capture from an enemy, as a war measure, and that no implied contract arose upon which a suit could be brought.

The authority of the *Klein* decision is not denied, but the opinion in that case is repeatedly quoted (pp. 95-98) with entire approval. The court says (pp. 97-98):

"Thus, after the war, simple submission by an insurgent to the authority of the government was the only price to be paid for pardon and restoration to the right, according to Klein's case, of using the means provided by Congress for the recovery of the proceeds of the sale of his captured or abandoned property. Pardon was, therefore, easy to be had, and the promise of a restoration of this class of property was tendered as a reward for its acceptance to such as would qualify themselves within the prescribed time to receive it."

In *Knote* vs. *United States*, 95 U. S., 149, claimant's property had been condemned and sold under the confiscation act of 1862. He claimed the proceeds already in the Treasury by virtue of his pardon. This court declared that a pardon did not restore rights already vested in the United States by sale and deposit under the confiscation act. The opinion was by Justice Field, who wrote the opinion in *Ex parte Garland* and concurred in the *Klein, Armstrong, Pargoud, Carlisle* and *Osborn* cases. These cases are all cited with approval in the opinion in this case, as follows (p. 153):

"The effect of a pardon upon the conditions and rights of its recipient have been the subject of frequent consideration by this court; and principles have been settled which will solve the question presented for our determination in the case at bar. *Ex parte Garland,* 4 Wall. 333; *Armstrong's Foundry,* 6 id., 766; *United States* v. *Padelford,* 9 id., 531; *United States* v. *Klein,* 13 id., 128; *Armstrong* v. *United States,* id. 155; *Pargoud* v. *United States,* id. 156; *Carlisle* v. *United States,* 16 id. 147; *Osborn* v. *United States,* 91 U. S. 474."

Osborn vs. *United States,* 91 U. S., 474, declares the limits of the doctrine in the *Knote* case. A decree of condemnation under the Confiscation Act had been entered by the District Court of Kansas against the property of a defendant taking part in the rebellion and the proceeds of the sale were in the possession of the court, when the defendant, being pardoned, applied for payment of the proceeds to him. The court said (p. 478):

"The pardon, in releasing the offense, obliterating it in legal contemplation (*Carlisle* v. *United States,* 16 Wall., 151) removes the ground of the forfeiture upon which the decree rests, and the source of title is then gone."

Austin vs. *United States,* 155 U. S., 419, was a claim for the proceeds of captured cotton during the war, brought under a special act giving jurisdiction to the Court of Claims, ending with a proviso that it be shown that the claimant was throughout the war loyal. This court cited the cases of *Klein, Armstrong, Pargoud, Carlisle* and *Osborn,* but discriminated the provision in this act by declaring (p. 432) that this proviso—

"* * * operated upon the entire enacting clause, and made loyalty a jurisdictional fact, since the consent to the prosecution of the suit was given upon the condition that that fact should be established."

It was added (p. 432):

"In declining to bestow jurisdiction in favor of pardoned offenders, whose claims were barred, Congress did not deny its proper constitutional effect to amnesty. To whom the privilege of suit should be accorded was for Congress alone to determine."

Finally it was stated (p. 432) in order to forbid any possible contention that this decision lessened the authority of the *Klein* decision:

"Undoubtedly Congress framed this act with due regard to the state of decision under the prior act, and hence, instead of making proof of loyalty an integral part of claimant's case with his ownership of the property and his right to the proceeds, as in the Captured and Abandoned Property Act, it made the establishment of loyalty in fact, as contradistinguished from innocence in law produced by pardon, a prerequisite to jurisdiction. Consent to be sued was given only on this condition."

The court thus recognized that Congress undoubtedly knew the state of decision under the act of March 12, 1863, and acted accordingly. The difference between the act construed in that case and those under consideration here may be illustrated in parallel columns:

Act of March 3, 1863, Sec. 12, 12 Stat. 767:

"*Provided, however*, That in order to authorise the said court to render a judgment in favor of any claimnant, if a citizen of the United States, it shall be set forth in the petition that the claimnant, and the original and every prior owner thereof where the claim has been asigned, has at all times borne true allegience to the Government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government."

Act of March 12, 1863, Sec. 3, 12 Stat. 820:

"And any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds."

Austin Special Act of March 3, 1883, 22 Stat. 804, quoted 155 U. S., 431:

"*Provided, however*, That it be shown to the satisfaction of the court that neither Sterling T. Austin, senior, nor any of his surviving representatives gave any aid or comfort to the late rebellion, but were throughout the war loyal to the government of the United States."

This court has held under the former acts that a pardon is sufficient proof of loyalty; under the latter act that proof of loyalty in fact is essential.

The legislation now under consideration is sections 159, 160 and 162 of the Judicial Code. Sections 159 and 160 are in the same words as the act of March 3, 1863; section 162 is a re-enactment by implication of the act of March 12, 1863.

We are entitled to paraphrase the language of this court, quoted *ante*, p. 17, that "undoubtedly Congress framed this act with due regard to the state of decision under the prior act and hence" made "proof of loyalty an integral part of claimant's case with his ownership of the property and his right to the proceeds" and thus adopted the decision of the Supreme Court "which made the establishment of innocence in law produced by pardon" "conclusive evidence that the offending acts never existed."

Conclusion on Loyalty.

The Court of Claims is correct in making (*post*, pp. 69, 70, 49 C. Cls., 313) the following among other deductions from the decisions above quoted:

"(1) The proclamation of December 25, 1868, relieved all persons within its influence from the pains and penalties of disloyalty and from any offense whatsoever in aid of the Confederate States. It blotted out whatsoever offense there was against the Government as effectually in contemplation of law as if the persons to whom amnesty was given had never engaged in hostile service or aided or sympathized with the Confederate States.

* * * * *

"(6) That the amnesty in itself established proof of loyalty regardless of former status."

It is therefore clear that the allegation of loyalty in the petition (*ante*, p. 3, Rec., p. 6) is a sufficient allegation and affords no ground of demurrer.

(II) Title.

The claimant asserts two positions upon this subject:

(1) Claimant's decedent had title to this cotton, when taken by the United States, notwithstanding the prior sale to the Confederate government.

(2) Congress intended by section 162 of the Judicial Code to recognize decedent's title and waive any possible defect caused by the prior sale.

The Court of Claims decided adversely upon both these points: The first, on the ground of the decision of this court in *Whitfield* vs. *United States,* 92 U. S., 165, and the second (*post,* p. 82), on the ground that the terms used in the act were insufficient to accomplish the asserted result.

(1) Decedent Had a Valid Title.

Decedent executed this bill of sale, received bonds and then held the property and the bonds until the vendee's dissolution and continued to hold the property until the United States took it. The claimant contends that the vendor's lien attached to the property as long as it was in his possession and that, upon the dissolution of the Confederacy and its destruction through military failure, the full legal title revested in the vendor, the holder of worthless securities.

The Whitfield Case.

In *Whitfield* vs. *United States,* 92 U. S., 165, this very contention was presented. The claimant there sold his cotton to the Confederate government and received Confederate bonds in payment and kept the bonds and the cotton, as in this case, until September 1, 1865, when the cotton was seized by the United States Treasury agents. He was allowed to retain fifty-nine bales. The balance was sold, and the pro-

ceeds placed in the Treasury. This court held that he was not entitled to recover under the act of March 12, 1863. This court is now asked to review the doctrine announced in the *Whitfield* case, as applied to the instant case.

A brief examination of the opinion in that case discloses certain elements of weakness in its reasoning. It seems inconsistent with itself. It first says (p. 170) that the sale was complete when the bonds were accepted and concludes (p. 171) by declaring the sale tainted with rebellion and unenforceable. The language relied on to support this statement is as follows:

Page 170. "The sale was complete when the bonds were accepted in payment. The title then passed to the Confederate states without a formal delivery."

Page 171. "In this case he seeks to enforce a right growing out of his contract of sale, which was tainted with the vice of the rebellion. It was a contract which could not have been enforced against him, and he is equally powerless under its provisions against others."

We are almost justified in saying that the rules announced in this case are:

(1) A sale of personal property to the Confederate States is a valid sale.

(2) A sale of personal property to the Confederate States is so unlawful that, if the vendor repudiates it, the courts will not relieve him from it.

In *Sprott* vs. *United States,* 20 Wall., 459, it was held in effect that title to cotton *did not pass* by conveyance *from* the Confederate States. It was decided in the *Whitfield* case that title *did pass* by conveyance *to* the Confederate States. The apparent

conflict between these decisions was reconciled upon the ground, arising entirely out of the circumstances of the Civil War, that the acts of purchase in the one case and sale in the other were equally in aid of rebellion and must consequently be construed most harshly against the offender. In spite of the reasoning of the court, designed to relieve these decisions from inconsistency, the mind finds difficulty in accepting the same result as properly deducible from opposite premises.

It is said of the *Whitfield* decision by Howry, J., in his concurring opinion below (*post*, p. 85), that "in its last analysis the want of loyalty was the reason for denying the relief." He amplifies this (*post*, p. 97) in saying:

"The crux of the *Whitfield* decision and of some analogous cases to it was the aid given to the rebellion. The act of disloyalty which barred recovery in all cases was the disloyalty named in the original abandoned or captured property act. The act of disloyalty precluding the right to recover in those cases where recovery has been denied is not now to be recognized because of the general amnesty removing all taint of disloyalty."

It is submitted that the decision is in this aspect in conflict with the *Padelford, Klein, Carlisle* and other cases quoted (*ante*, pp. 7-14).

The True Rule of Sale.

In the *Whitfield* case the claimant contended that a vendor in possession, upon insolvency of the vendee, has a lien upon the goods for the purchase price and that this lien is unaffected by the delivery of a note or other security. The claimant here, if free from the

authority of the *Whitfield* case, would assert the same principle. It is abundantly sustained on authority.

In Benjamin on Sales, section 767, the question is asked:

"But if we now suppose that, after a bargain in which the lien has been thus unequivocally waived, the buyer, for his convenience, or any other motive, has left the goods in the custody of the vendor until the credit has expired and has then made default in payment, or has become insolvent before the credit has expired, what are the vendor's rights?"

The authorities are reviewed, and the question is then answered, section 779, so far as necessary in application to the present case, by the following:

"If the controversy be between the unpaid vendor and the insolvent buyer, or the latter's trustee, the vendor may refuse to give up possession of the goods without payment of the price."

Miles vs. *Gorton*, 2 C. & M., 504, is exactly in point here.

There was a sale of goods to remain at rent. Subsequently the vendee accepted a bill drawn by the vendor for the price and this was negotiated. While the bill was running, the vendor sold part of the goods with the consent of the vendee. Then later the vendee became bankrupt and it was held that the trustee in bankruptcy could not maintain trover for the goods without paying the price. In delivering the opinion of the court, Bailey, B., said (p. 512):

"When the bill is dishonoured, there is no longer payment, or anything which can be considered as

an equivalent to payment; and it seems to me that the assignee of the bankrupt cannot, after what has taken place, insist on delivery without actual payment. It is said the bill is still outstanding. That is true; and it may, perhaps, operate to prevent the seller from having a complete right to the goods, so as to give a valid title by reselling them to a third party; but the only question in the present case is, whether he had not a right to hold them until the price is paid."

And Vaughan, B., said (p. 514):

"Afterwards, however, the situation of the parties was changed, and by the insolvency and bankruptcy of the buyer and the dishonour of the bill, and the case became the ordinary case of an unpaid vendor, who has a right to hold the goods until the price is paid."

Gurney, B., said (p. 515):

"I am of the same opinion: it is clear that nothing has occurred to affect the right of the vendor as against the vendee or his assignee. The goods in question remained in the possession and under the control of the seller, and the lien for the price which he clearly had on the dishonour of the bill entitles him to hold them."

This case is cited, quoted from and relied on in *Grice* v. *Richardson,* L. R. 3 App. Cases, 319 (decided in 1877).

In *Townley* vs. *Crump,* 4 A. & E., 58, the vendor had given a delivery order addressed to the vendee, saying, "We hold to your order" the goods sold, and it was shown that this was the invariable mode of delivering goods and a basis for obtaining credit, but the court said (p. 63):

"There was a total failure of proof that, where a vendor, who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching, and I think it is not contended that there is any general usage which could divest this right in such a case upon the insolvency of the vendee."

In *Dodsley* vs. *Varley,* 12 A. & E., 632, the rule was extended to a case where the goods were removed to the warehouse of a third party where defendant collected various parcels of the same goods.

In *Gunn* v. *Balckow,* L. R. 10 Ch. App. 491, it was held (syllabus) that "the giving of acceptances in pursuance of the contract was not an absolute payment, but conditional on acceptances being met; that upon the insolvency of the acceptors the vendors' lien in the goods revived; and that the fact of the vendors having negotiated the bills made no difference."

See also *Griffiths* vs. *Perry,* 28 L. J. Q. B., 204; 1 E. & E., 680; *Ex parte Chalmers,* L. R. 8 Ch. 289; *Bloxam* vs. *Sanders,* 4 B. & C., 941; *Grice* vs. *Richardson,* L. R. 3 App. Cas., 319 (all cited in Benjamin on Sales); *Page* vs. *Cowasjee,* L. R. 1 P. C. App., 127. On stoppage *in transitu* see *Northey* vs. *Field,* 2 Esp., 613; *D'Aquila* vs. *Lambert,* 2 Eden, 75; *Mason* vs. *Lickbarrow,* 1 H. Bl., 357.

The American rule is in complete consonance with the rule of the English courts as stated by Mr. Benjamin and supported by the authorities referred to above. It is thus stated by Follett, C. J., in New York in 1891 in *Tuthill* v. *Skidmore,* 124 N. Y. 148, 153:

"When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title of the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu,* or retains them before *transitus* has begun, he can, by a sale made on notice to the vendee, vest a purchaser with a good title (*cases cited*). His right is nearly that of a pledgee, with power to sell at private sale or default (*cases cited*). The vendee having become insolvent and refused payment of the notes given for the purchase price of the property which remained in the vendor's possession, his right to retain it as security for the price was revived as against the vendee and his attaching creditor (*cases cited*)."

See also:

Milliken vs. *Warren,* 57 Me., 46; *Arnold* vs. *Delano,* 4 Cush. (Mass.) 33; *Haskell* vs. *Rice,* 11 Gray, 240; *Woodland Co.* vs. *Mendenhall,* 82 Minn., 483; *Conrad* vs. *Fisher,* 37 Mo. App., 352; *Vogelsang* vs. *Fisher,* 128 Mo., 386; *Clark* vs. *Draper,* 19 N. H., 419; *Bell* vs. *Moss,* 5 Whart. (Pa.), 189; *White* vs. *Welsh,* 38 Pa. St., 396; *Robinson* vs. *Morgan,* 65 Vt., 37; *Moses* vs. *Rasin,* 14 Fed., 772, 774; *McElwee* vs. *Metropolitan Co.,* 69 Fed., 302.

Judge Howry's concurring opinion below accepts this doctrine, saying (*post,* p. 96):

"By implication of law a lien on goods continues for the price notwithstanding the property in the goods may have passed to the buyer *so long as the seller is in possession.* The authorities, English

and American, are numerous on this point. An unpaid seller having in custody the goods sold and retaining actual possession of the goods as against a buyer may yet enforce his lien in case of the buyer's insolvency before the maturity of the obligation given."

When the *Whitfield* cotton was taken the Civil War was, in fact, over, although theoretical war still existed (*The Protector*, 12 Wall., 700). It was nearly ten years later that this court decided the Whitfield case, applying this well-settled rule of commercial law governing civil affairs but enforcing a rule derived from conditions of war. Its apparent limitation of the broadly benevolent doctrines of the *Garland, Padelford* and *Klein* cases seems to retain a trace of the passion of the Civil War, perhaps caught from the "earnest denunciation of the wickedness of the rebellion," which Field, J., found (20 Wall., 474) in the opinion in the *Sprott* case, there cited and relied on.

This is the view apparently taken by Judge Howry below (*post*, p. 97):

"The authorities cited in the opinion of the court establish the doctrine of liens in cases of insolvency at common law and as said in *Benjamin on Sales*, the lien for the unpaid price finds support in American cases. In *Whitfield's case* it has not found support because the transaction was one between common belligerents against the United States."

In this day, when fifty years have quenched all animosity and a united nation is engaged in an even greater conflict, it is not improper to ask this court to review with the calm of history, under a later act of Congress, a question once decided forty years ago.

If it be suggested that in this case there was no actual ownership to support a suit, but only a lien, an answer is found in the decision in *United States* vs. *Villalonga,* 23 Wall., 35, 42. This recognizes the right of a lienor to claim under the act of 1863 and recover to the extent of his lien out of the proceeds in the Treasury. But here there is more than a lien, for the vendee against whom the lien was held was more than bankrupt. The Confederacy was utterly dissolved and title necessarily revested completely in the vendor in possession.

The suggestion is possible that whereas in the *Whitfield* case the bonds were actually produced in court (92 U. S. 165), the administrator here merely states his belief that they remained in decedent's possession until the cotton was taken. That belief is justified by the facts of history. The two works upon the financial history of the Confederate States, later cited (*post,* p. 32; see particularly Schwab, pp. 10, 22, 46-49), show that Confederate notes were convertible into bonds and that the Confederate authorities were continually trying to induce such conversion, even going so far (pp. 52-53) as to attempt a compulsory refunding. The railroads accepted half their pay for services in bonds. The loyal devotion of the bondholders to the aims of the Confederacy led them to refrain from attempting to convert their bonds into currency, but had they tried, the undesirability of the bonds as an investment and the governmental pressure in the opposite direction would have made a market practically impossible. The bonds issued in payment for this cotton therefore remained almost without exception in the hands of the planters to whom they were issued and were

in their hands when the surrender at Appomattox destroyed their value.

(2) *This Defense Waived.*

Claimant now contends that it was the intention of Congress, in the act of 1911, to waive this defense of Confederate title in this class of claims. Unless this act is so construed, it is without effect. The facts showing that it would be ineffective, unless so construed, were publicly and officially declared prior to its passage. The intent to waive the defense of Confederate title is deducible from the language used, when read in the light of the historical conditions existing on March 3, 1911.

Rule of Interpretation.

In *Smith* vs. *Townsend,* 148 U. S., 490, this court stated a cardinal rule for the interpretation of statutes, as follows (p. 494):

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus in *Heydon's case,* 3 Rep., 7b, it is stated that it was resolved by the Barons of the Exchequer as follows:

" 'For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered:

" 'First: What was the common law before the making of the act.

" 'Second: What was the mischief and defect for which the common law did not provide.

"'Third: What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

"'Fourth: The true reason of the remedy.'

"And by this court in *United States* v. *Union Pacific Railroad,* 91 U. S., 72, 79, it was said that 'courts in construing a statute may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge* v. *Williams,* 3 How., 24; *Preston* v. *Browder,* 1 Wheat., 120.' And in *Platt* v. *Union Pacific Railroad,* 99 U. S., 48, 64, that 'in endeavoring to ascertain what the Congress of 1862 intended, we must as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it and discover its purpose from the language used in connection with the attending circumstances.'"

Outline of Argument.

In applying this rule of interpretation to this case, we shall attempt to show:

(1) That the only claims (with a few negligible exceptions) within this act are for cotton of which there was a similar sale to the Confederacy.

(2) That this fact was publicly and officially made known before the passage of this act.

(3) That at the close of the Civil War the waiver of this Confederate title in favor of planters holding the cotton in possession was advocated by most distinguished civil and military authority as the proper policy of the United States.

(4) That, if the decision below be sustained, Section 162 of the act of 1911 will be a nullity.

From this we shall argue:

(5) That Congress cannot be held to have acted either in ignorance of the facts or with a purpose to do nothing.

(6) That Congress may be presumed to have meant to accomplish at this late date what benevolent statesmanship had contemporaneously proposed.

(7) That the terms of the act, read in the light of the historic conditions, show that this was the legislative intent.

In making this inquiry, we will consider the allegations of the petition, in connection with the facts of public history of which the court either takes judicial notice or may acquire knowledge by reference to official public documents. The last is justified by the rule announced in *New York Indians* vs. *United States*, 170 U. S., 1, 32:

"While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance."

(1) No Other Claims.

One of the earliest efforts of the Confederate Treasury to finance the war was the use of credit based on cotton. The first Secretary of the Treasury, Hon. C. G. Memminger, on May 10, 1861, suggested that cotton should be placed at the government's disposal in exchange for bonds issued on their security. This was promptly carried into law, resulting in the "cotton loans." The cotton was not collected by the Confederate government at any central depot, but remained on the plantations of its

owners. Bills of sale were given in the form which appears in this record, pp. 1-2. These purchases continued until the middle of 1863. (See "The Confederate States of America," by John Christopher Schwab, one of the Yale Bicentennial Publications, New York, 1901, pp. 5-27.)

J. D. B. De Bow was sent to Mississippi when the crop of 1862 was being marketed, and from September to December, 1862, bought 70,000 bales for $4,474,400, at 13 1-2 cents in bonds. Alabama, Mississippi and Louisiana furnished ninety per cent of the entire amount. De Bow estimated that he secured one-third of the crop in Mississippi. (See "History of the Confederate Treasury," by Ernest A. Smith, publications of the Southern Historical Association, Volume 5, p. 105 *et seq.*) The cotton forming the subject of the bill of sale in this case (Rec. p. 2) was a portion of this cotton. The same may be said of the cotton under discussion in *Whitfield* vs. *United States,* 92 U. S., 165; 11 C. Cls., 444; and in *Gooch* vs. *United States,* 15 C. Cls., 281.

This cotton generally remained in the hands of the planters until the collapse of the Confederacy. The Secretary of the Treasury of the United States then proceeded to assert the title of the United States to it, and used the existing machinery under the act of March 12, 1863, Sec. 3, 12 Stat., 820, for the collection of this cotton.

Records of these transactions appeared on the books of the Treasury Department of the Confederate States and these records came into the possession of the agents of the United States, who were directed to collect the cotton described in the bills of sale but not to take cotton to which no Confederate claim of title was asserted. This appears not

only from the allegations of pars. II and IV of the petition (Rec., p. 2), but also from official circulars, orders, rules and regulations issued by the Secretary of the Treasury and published in 1872 by the Treasury Department in a pamphlet entitled "Acts of Congress, Rules and Regulations Concerning Commercial Intercourse, Captured and Abandoned Property, etc." This has been reprinted in H. R. Rep., 1820, 53d Cong., 3d Sess. These rules, regulations, circulars and instructions are summarized by Chief Justice Chase in his opinion in *McLeod* vs. *Callicott,* Chase; 16 Fed. Cas., 295, as follows (p. 296):

"The new regulation or prohibitory order, therefore, did not extend to property which had been captured or surrendered by military officers of the Confederate government to the United States. But with that exception the prohibition is complete and final, and no agent of the Treasury Department was justified in receiving after June 30, 1865, any captured property, unless theretofore surrendered; much less was any such officer warranted in making any capture of unsurrendered cotton himself after the date, with or without military aid. He had no authority to do so. All his powers, as we have said to you, were derived from the Treasury Department, and when the Treasury Department withdrew that general authority it was at an end. The question, then, in this case is whether this was a part of the property which had been surrendered by the military authority of the Confederate government to the United States prior to June 27, 1865."

Extracts from the original documents appearing in the above pamphlet are annexed hereto as Appendix E, *post,* pp. 106-109.

It is thus shown that the cotton taken after June 1, 1865, was necessarily, in general, cotton which had been the subject of sale to the Confederacy. This is definitely stated in the petition (par. VII, Rec., p. 5) and admitted by the demurrer. Some cotton considered private property under these Treasury instructions was taken by mistake. There have been four remedial opportunities for the correction of such mistakes.

(*a*) The first of these was the so-called "release" by the Secretary of the Treasury, a power freely exercised, as appears by the Secretary's report in Senate Ex. Doc. 23, 43d Cong., 2d Sess. This is a report to Congress containing a schedule showing the number of bales of cotton seized after June 1, 1865, from whom taken, how disposed of and the net proceeds, and "what disposition was made of the proceeds before being paid into the Treasury." A separate column appears in the schedule, headed "Proceeds released by the Secretary of the Treasury," and many cases for considerable amounts are shown in that column. The fact that such releases were made also is stated in former Secretary McCulloch's reminiscences, printed as Appendix "C" (*post*, pp. 101-102). This practice continued until the act of March 30, 1868, 15 Stat., 251, covered all funds derived from the sale of captured and abandoned property into the Treasury.

(*b*) The second means of relief by action in the Court of Claims under the act of March 12, 1863. Judgments were rendered under that statute for some whose cotton was taken after June 1, 1865, by bringing themselves under exceptions to the rule laid down in the *Whitfield* case. Thus in *Sykes* vs. *United States*, 8 C. Cls., 330, the husband's sale of

his wife's cotton to the Confederate government, and in *Tayloe* vs. *United States,* 5 C. Cls., 701, an unauthorized agent's sale of his principal's cotton were held invalid. See also judgments in *Davie* vs. *United States,* 10 C. Cls., 604; *Moore* vs. *United States,* 7 C. Cls., 356.

(*c*) A second executive remedy was that given by the act of May 18, 1872, Sec. 5, 17 Stat., 134, as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the lawful owners, or their legal representatives, of all cotton seized after the thirtieth day of June, 1865, by the agents of the government unlawfully and in violation of their instructions, the net proceeds, without interest, of the sales of said cotton actually paid into the Treasury of the United States:

"*Provided,* That the receipt thereof shall be taken and received in full satisfaction of all claims against the United States for or on account of the seizure of said cotton; and a sufficient sum for such payment is hereby appropriated out of any money in the Treasury not otherwise appropriated;

"*And provided further,* That the foregoing provisions shall not apply to any claim now pending before the Court of Claims, nor to any claim not filed in the Treasury Department within six months after the passage of this act;

"And the sum of $20,000 is hereby appropriated for the payment of the necessary expenses of defending the United States in respect to claims for said proceeds to be expended under the direction of the Secretary of the Treasury."

Under this statute, claims were filed in the Treasury Department for 136,148 bales of cotton and allowed for $188,168.51. (See Senate Ex. Doc. 23, 43d

Cong., 2d Sess., p. 58; House Ex. Doc. 189, 44th Cong., 1st Sess.; Senate Ex. Doc. 115, 50th Cong., 2d Sess.; petition, par. VI, Rec., pp. 3-5; Exhibit A, Rec., p. 9.)

The rejection of the remainder of these claims was almost without exception on the ground that the cotton was the property of the Confederate government when taken. (See Treasury reports, petition, par. VI, pp. 3-5; Exhibit A, Rec., p. 9.)

(*d*) A second judicial remedy was the right to appeal to the Court of Claims upon rejection by the Secretary of the Treasury under the act of 1872, a right fully recognized by the rules later laid down by this court in *Medbury* vs. *United States*, 173 U. S., 492, and *McLean* vs. *United States*, 226 U. S., 374. No figures are available to show what, if any, advantage was taken of this remedy.

In all these opportunities for payment of the net proceeds to cotton claimants after June 1, 1865, the decision in the *Whitfield* case applied. Claimants who could show their rights under the rule in this case could recover under these four remedies. Those claimants whose cotton had been the subject of a Confederate sale under the rule in that case had no opportunity to recover under any of these remedies. It is not surprising to find that practically all who could bring themselves within this rule had done so under one or the other of the opportunities so presented.

(2) *Public Notice.*

On November 2, 1894, an official report was made in the Treasury Department and printed as an official document in which the figures are reviewed and the conclusion stated:

"The above showing is based entirely upon published documents and the conclusion is inevitable that the balance of the captured and abandoned property fund in the Treasury represents the proceeds of cotton seized after June 30, 1865, which belonged to the Confederate government."

In another document similarly issued, January 9, 1900, it is stated:

"The claims were nearly all disallowed, for the reason that the Confederate records in this division showed that the claimants had sold the cotton to the Confederate government and it was not therefore individual cotton when seized after the June 30, 1865, but was the property of the Confederate government.

"It will be noticed that the amount received from the sale of this Confederate cotton about equals the amount of the proceeds of the captured cotton which remained after the payment of the judgments, etc., as above stated.

"It follows, therefore, that the balance of the fund in the Treasury received from the sale of cotton represents the proceeds of the sale of cotton that belonged to the Confederacy."

These documents are both made a part of the petition in this case (par. VII, Rec., pp. 3-5; Exhibit A, p. 9).

(3) The Act a Nullity, as Construed.

It is evident from these premises that, if Sec. 162 of the act of 1911 is intended only for the benefit of those whose cotton was taken after June 1, 1865, who had made no sale to the Confederacy, the act is

superfluous, useless and without effect. Judge Howry's concurring opinion, *post*, p. 84, well summarizes the condition in the following language:

"Probably not a baker's dozen of these numerous petitioners can recover if the act under which the suits have been brought be so interpreted as to require proof of all the things which the administrative part of the government now claim is necessary."

The judgments of the Court of Claims all appear in its volumes of reports and in the reports of its clerk to Congress under Sec. 143 of the Judicial Code. During the whole period of nearly seven years since this act was passed only seven judgments appear to have been rendered in favor of claimants under Sec. 162. (No such judgments in 1911, 1912, 1913, 1914, 1915, 46-50 C. Cls. Repts.; three shown in 1916, 51 C. Cls., 505, 506, 509; four in 1917, H. R. Doc. 437, 65th Con., 2d Sess.) It may be treated, therefore, as established that if this decision be sustained, Sec. 162 will be little more than a nullity and that a reversal of the decision below is essential, if any remedial effect is to be given to it.

Judge Howry's opinion below (*post*, p. 97) correctly declares:

"The general contentions of the Government in this and kindred cases are that the bar of the statute of limitations only is waived; that section 162 of the Judicial Code did not enlarge the scope of the original abandoned or captured property act which provided only for the relief of loyal owners who could trace the money derived from sales to the Treasury. The effect of these contentions is that the act is almost wholly destitute of any meaning and but an idle and misleading piece of legislation."

(4) *Contemporaneous Favor.*

At the close of the Civil War the question whether this cotton should be taken by the United States or left in possession of the planters who held it was the subject of serious consideration and difference of opinion. General Grant and Chief Justice Chase both expressed the opinion that this particular cotton remaining on the plantations, although once sold to the Confederacy, should not be sought for or taken. General Schofield concurred in his superior's view. General Grant's view appears in "Forty-six years in the Army," by Lieutenant General John M. Schofield, New York, 1897, p. 372:

"On May 29 [1865] General Grant from Washington, ordered me to 'give every facility and encouragement to the getting to market cotton and other southern products. Let there be no seizure of private property or searching to look after Confederate cotton. The finances of the country demand that all articles of export should be gotton to market as speedily as possible.'

"I answered at once:

" 'Your dispatch concerning cotton and other productions is received. I some time ago removed all military restrictions upon trade, and have given every facility for carrying cotton and other products to market. The only obstacles in the way are the restrictions of the Treasury Department. It would be a blessing to the country if the whole system could be abolished. Now only one man in North Carolina is authorized to buy cotton, and he does not pay money for it. It is impossible for people to get their products to market in this way.' "

Chief Justice Chase made a tour of the south in the years 1865 and 1866, accompanied by Whitelaw

Reid, who himself later reached civil distinction. Mr. Reid published a work entitled, "After the War: A Southern Tour. May 1, 1865, to May 1, 1866," in which the situation in regard to this cotton is fully stated and an elaborate expression is given of the Chief Justice's views, whose conclusions are summarized as to this cotton as follows (pp. 208, 209):

"Weeks, indeed, before this, while the party was at Key West, Mr. Chase had foreseen, from the indications along the Atlantic coast, the troubles in store, and had suggested what seemed to him the wisest policy for avoiding them. He would have had the President issue a proclamation setting forth substantially:

"1st. That all present holders of cotton sold or subscribed to the Confederate government, but never delivered, should be recognized as its lawful owners, on the ground that the consideration for the stipulated transfer had failed."

The entire presentation by Mr. Reid of the Chief Justice's views is added hereto as Appendix "D," *post*, pp. 102-106. In the light of these statements, it may be confidently asserted that, had Chief Justice Chase continued as Secretary of the Treasury, instead of being selected to preside over this court, the claims now under consideration would not have originated, because he would have treated this cotton as the property of its possessors.

See also Exhibit F, *post*, pp. 109-111.

(5) *Purpose of Congress.*

We can now "place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose in the language used in

connection with the attending circumstances," a method of statutory construction approved by this court in *Smith* vs. *Townsend,* 148 U. S., 490, *ante,* p. 30.

The government's contention necessarily involves one of two theories as to the action of Congress:

(1) That it passed Sec. 162 of the act of March 3, 1911, in ignorance of actual conditions, or

(2) That it passed this section with knowledge that it was legislating without effect.

The authorities are abundant that an act of legislation must not be construed in either of these ways.

(*a*) *Congress Must Be Supposed to Act Intelligently.*

This principle is authoritatively stated by this court in *Chesapeake & Potomac Telephone Company* vs. *Manning,* 186 U. S., 238, as follows, p. 245:

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

In *Flint Plank Road Co.* vs. *Woodhull,* 25 Mich., 99, Judge Cooley says:

"We must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives under any circumstances when acting within the limit of its authorities."

In *Regina* vs. *Wattford,* 9 Q. B., 635, it was said by Lord Denman, C. J.:

"It is important to keep in view the state of the law with which we must assume that the legislature was acquainted when that statute passed."

In *Jones* vs. *Brown,* 2 Ex., 332, Pollock, C. B., said:

"It is by no means an inconvenient mode of construing statutes to presume that the legislature was aware of the state of the law at the time they passed."

A strikingly apposite case is that of *Erskine* vs. *Nelson County,* 4 N. Dak., 66. An act was passed authorizing the funding of the outstanding indebtedness of Nelson County, N. Dak. The question was whether this validated previously void warrants of that county, or merely authorized the funding of valid warrants. The court said (p. 70):

"At the time of the passage of said act, certain facts existed—some of them notorious and others of them of record and brought to our attention by the abstract in this case—of which we must not lose sight if we would correctly measure the legislative purpose."

The court then set forth a large number of facts—the organization of the county without funds, the issuance of warrants in excess of the legal amount, the invalidity of these warrants, the failure to pay them, the amount of outstanding unpaid invalid warrants, and the absence of unpaid valid warrants, and said:

"If, as has been suggested, the act in speaking of county warrants, meant valid warrants and no oth-

ers, then it is clear that there were no warrants whatever upon which the act could take effect. No single step could be taken under the act, and it becomes a useless blot upon the statute books. If on the other hand, by the use of the terms 'county warrant' the legislature meant all instruments that were in such form which had been put forth by the county, and if it was the purpose to validate all such instruments and provide for their payment, then every sentence of the act becomes instinct with life and purpose and usefulness."

It was urged that the facts stated were not known to the legislature and that the bill in question was passed without investigation of the indebtedness of Nelson County. The court said, p. 72:

"We are not allowed to cast upon the popular branch of government this imputation of ignorance and negligence. On the contrary, we are bound to presume that it performed its duties intelligently and faithfully, and unless the contrary appear from its own records, we think such presumption ought to be conclusive here."

After citing authorities, the court said, p. 73:

"Under these authorities, we are bound to say that when the legislature authorized the issuance of the bonds of Nelson County to the extent of $30,000, for the purpose of funding outstanding indebtedness, it did so with the full knowledge of the financial condition of Nelson County, and knowing that the outstanding warrants amounted to nearly or quite the full amount of bonds authorized. It also knew that such warrants were beyond any limit allowed by law, and were necessarily invalid."

The facts which that court presumed were within the knowledge of the legislature were far more diffi-

cult of ascertainment and far less public than those which we ask this court to consider as within the ken of Congress when this act was passed.

These authorities show that the proper position for the courts to take is to assume that Congress knew the conditions in regard to these claims, as set forth in this brief, when it passed Sec. 162.

(b) *Congress Must Be Supposed to Act Effectively.*

If Congress knew that all claims to be presented to this court under this section were for cotton sold to the Confederacy, then it cannot be presumed to have sent them to the Court of Claims for formal rejection but must have intended substantial relief.

The principle applicable here is that asserted by this court in *Unity* vs. *Burrage*, 103 U. S., 447, in relation to the act there under consideration, p. 457:

"There is no ground for the theory that the act of March 27, 1869, is inoperative. We are bound, if possible, to give it effect, *ut res magis valeat quam pereat.*"

Among Vattel's maxims of interpretation of treaties, cited in Potter's Dwarris on Statutes, p. 128, is the following statement equally applicable to statutory interpretation:

"16. The interpretation which renders a treaty null and void, cannot be admitted; it is an absurdity to suppose that after it is reduced to terms, it means nothing. It ought to be interpreted in such a manner, as that it may have effect, and not to be found vain and elusive."

In *Simmons* vs. *California Powder Co.*, 7 Colo., 255, the court, in construing an obscurely expressed statute, said, p. 287:

"The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably inferred."

In *Nichols* vs. *Halliday*, 27 Wis., 406, the court said, p. 408:

"* * * we must construe the language used by the legislature so as to give it some meaning, rather than put upon it a sense which will make it produce no effect, and in reality deprive the law of all life and force. This is a cardinal rule in the interpretation of statutes."

The maxim of Vattel, above quoted, is cited, p. 409.

In *Bailey* vs. *Commonwealth*, 11 Bush (Ky.), 688, the court said, p. 691:

"One of these rules is * * * that a law ought to be interpreted in such a manner as that it may have effect and not be found vain and illusive."

In *Rushville* vs. *Rushville Gas Co.*, 132 Ind., 575, 581, it was said:

"It will never be presumed that the legislature in the enactment of a given law, has done a vain thing."

An interesting application of this principle is found in *Howard Association's Appeal*, 70 Pa. St., 344. This was a conflict between a general law against exemption from taxation of property of re-

ligious associations used for business purposes and a later private act exempting certain of appellant's property "so long as used for charitable or religious purposes." When this act was passed, the upper story of the building was leased to the city for public school purposes and the lower floor used for religious purposes. The court took cognizance of the existence of these conditions and declared the property exempt as against the contention that the tax should be levied on the part occupied for school purposes. The court said, p. 346:

"It is a cardinal rule that all statutes are to be so construed as to sustain rather than to ignore them, to give them operation if the language will permit, instead of treating them as meaningless; *ut res magis valeat, quam pereat.*"

See also *Winter* vs. *Jones,* 10 Ga., 190, 200; *Reed* vs. *Goldneck,* 112 Mo. App., 310, 313, 314.

Defendants' contention is that Congress, either from ignorance of the facts or from ill-will, has said to claimants whose cotton was taken after June 1, 1865, that they may come into the Court of Claims, although no redress is to be given them, when there. That intent is too unreasonable to be ascribed to Congress.

(6) A Reasonable Intent.

It is not unreasonable to suppose that Congress intended to pay this money in the Treasury to those who had raised this cotton, who had received nothing of value for it and from whose possession it was taken.

(*a*) The courts are obliged to confine themselves

to the strictly legal aspect of demands against the government. Congress exercises a broader equity and can consider what in good conscience ought to be allowed beyond strict rules of law. This was recognized by this court in *United States* vs. *Realty Company*, 163 U. S., 427, 440:

"The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded."

By a number of private acts Congress has appropriated to pay individual claims which had been adversely decided by this court or the Court of Claims. Thus, the adverse judgment in *Adams* vs. *United States*, 2 C. Cls., 70, affirmed, 7 Wall., 463, was overridden by Congress by the act of January 20, 1873, 17 Stat., 713; the adverse judgment in *Hawkins* vs. *United States*, 12 C. Cls., 181, affirmed, 96 U. S., 689, by the act of March 2, 1881, 21 Stat., 636; the adverse judgment in *Schillinger* vs. *United States*, 24 C. Cls., 278, affirmed, 155 U. S., 163, by a provision in the omnibus claims act of May 27, 1902, 32 Stat., 239; and the adverse judgment in a cotton claim under the act of March 12, 1863, *Mitchell* vs. *United States*, 21 Wall., 350, was set aside by the appropriation in the omnibus claims act of February 24, 1905, 33 Stat., 776, for $128,692.22 in favor of the administrator of Warren Mitchell.

(*b*) General Grant and Chief Justice Chase, even while the heat of combat still remained, felt that justice to a prostrate people demanded the withdrawal of the Treasury agents seeking to secure all cotton to which any shadow of Confederate title had attached. They were right. Mr. Reid correctly said (*post*, p. 105):

"Time will show—indeed, most men will agree that it has already shown—the wisdom and statesmanlike sagacity of the views thus early presented to the consideration of the President."

The South was financially prostrate; cotton was its only present wealth. This cotton, remaining in possession of the planters who raised it, for which they had received nothing of value from the sale to the Confederate government, would have gone a long way toward restoring many ruined plantations. A more considerate national policy would have waived all question of strict legal right and left the planters in possession of the cotton. But the Secretary of the Treasury asserted the Government's extreme claim, seized the cotton and neglected the opportunity for the exercise of generosity. This court upheld the seizure as a matter of strict legal right.

Is it not reasonable to think that Congress intended to make some repair for the harshness of the preceding generation by giving to the few survivors of the former day and to their descendants the net proceeds realized from the sale of this cotton?

That the mistakes of the years after the war form a sad page in our history is the mournful conclusion of the entire nation. This sentiment has found a legislative expression in Sec. 162 of the act of March

3, 1911. This is intended as an act of grace on the part of the United States to remedy the exaction at the close of the war of the literal "pound of flesh" and to return to those losers what ought not morally to have been taken from them, even though the letter of the law allowed the spoliation. The claimant asks this court to carry the restorative purpose of that act into effect.

(*c*) The concurring opinion of Judge Howry below opens with a statement that there is no purpose to dispute the authority of *Whitfield* vs. *United States*, but suggestions throughout this opinion are that, if the learned judge had not felt himself concluded by that opinion, the reasoning above outlined would have prevailed. Thus, he asks substantially in accordance with the positions above taken (*post*, pp. 91, 92-93):

"The Confederacy, not having been either a *de jure* or a *de facto* government and the matter of loyalty having been eliminated when the recent legislation was enacted, can it not be reasonably supposed that with knowledge of these conditions and the reason for seizing cotton after June 1, 1865, being no longer necessary because of the collapse of the Confederacy, the Congress framed the act under which these cases are brought with the intent to have the appellate court review its decisions in the light of all the history of that period

* * * * * *

"May not Congress by the act of 1911 have had in view those decisions which decided that there was no power in the government of the United States to continue to take property temporarily for the purpose of destroying the credit of the hostile forces in the absence of a legislative declaration confiscating it? And may not those bodies have thought that the Secretary of the Treasury was without lawful au-

thority to bring into practical operation acts of confiscation by a mere order, there being no belligerent power in existence? Even if a department order was given in May, 1865, may not Congress in adopting Section 162 of the Judicial Code have been actuated by the intent to afford relief, because there was no necessity to make seizures when hostilities had ceased and peace had been practically restored?"

The later reasoning of the opinion suggests the proper answer to these questions, saying (*post*, p. 94):

"Section 162 does not dispense with proof of ownership and could not with reason have done so, because Congress never intended to provide for anybody but owners. In reviving the original act Congress had knowledge that the proceeds of sales were yet held in trust, and those bodies probably concluded that with the loyalty phase of the matter eliminated there was no necessity for legislation to be more explicit. The Supreme Court had declared in terms that the proceeds of sales constituted the trust fund, which impliedly meant that at some future time remedies might be provided so as to dispense with proof of loyalty. This implication results from the statement of the court that the property of the original owner was in no case absolutely divested. Taken in connection with the suggestion that confiscation was repudiated by the Supreme Court it is proper to say that future remedies were deemed by the appellate court as probable."

What is more natural, in this day of national fraternity, than that Congress should declare that, in the adjudication of claims arising after the close of actual hostilities, the beneficent rule of commercial law designed to protect a vendor in possession should prevail over the rigorous enforcement of a harsher

rule under the provocation of a hard-fought and just concluded war?

(7) *The Language of the Act.*

The foregoing argument as to the intent of Congress is answered by the Court of Claims in the following language (*post*, pp. 81, 82):

"We think the view urged upon us that Section 162 was intended to authorize parties who had sold their cotton to the Confederate States to sue for the proceeds of the sale of that cotton in the Treasury—or, in other words, that by the enactment of that section the Congress in effect intended the court to disregard the decision in the *Whitfield case*—is untenable.

"We must construe a statute according to the plain import of its language, and the section in question is not susceptible of the construction that the 'claims of those whose property was taken' who are later referred to as 'the owners' of the net proceeds means persons who had sold their cotton and were therefore not the 'owners thereof' or of the net proceeds."

The court in this passage has overlooked the difference in language between the act of March 12, 1863, and Sec. 162 of the Judicial Code. The act of March 12, 1863 (12 Stat., 820), was not primarily a claims act, but was "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States." The third section (*ante*, p. 6) gives the right to prefer a claim in the Court of Claims to "any person claiming to have been the owner," etc., "and on proof to the satisfaction of said court of his ownership of said property, of his

right to the proceeds thereof," etc. The act of 1911 gives the right to hear and determine the "claims of those whose property was taken subsequent to June the 1st, 1865." Here was a new description of a class known to Congress. This decedent was at the time of seizure holding this property as his own. The vendee had disappeared and dissolved and was no longer in existence. The purchase price had not been paid. The decedent was the person "whose property was taken." He answers the description of the act—a description so far differing from that in the act of March 12, 1863, as to afford warrant in its terms for the persuasive premises arising from the historical facts. The use of the date "subsequent to June 1, 1865," is of itself eloquent of the purpose of Congress to apply not the war rule applied in the *Whitfield* case but a different rule applicable to time of peace. There was no reason for making a discrimination between claims arising before and after this date, except a manifest intention to return to well-settled rules governing sales of personal property in times of peace, rather than to adhere to the harsh rule of war applied in the *Whitfield* case.

CONCLUSIONS.

It is respectfully submitted:

(1) The *Whitfield* case was an erroneous exposition of the law and should be overruled.

(2) Sec. 162 of the act of 1911 was passed by Congress for the purpose of doing away with the harsh doctrine of that case:

(*a*) Any other theory would imply that the act was passed by Congress either ignorantly or to a wholly futile end;

(*b*) Four remedies had already been given to claimants whose cotton was taken during this period, if they could bring themselves within the rule of the *Whitfield* case, and no reason can be shown why a fifth remedy should be given to the same class of persons;

(*c*) Many good reasons can be given why Congress should have adopted a benevolent policy of relief;

(*d*) The terms of the act show the intention of Congress that a different rule is to be applied in regard to ownership than that which obtained under the original act of 1863.

WILLIAM B. KING,
Attorney for Appellant.

GEORGE A. KING,
SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Of Counsel.

APPENDIX "A."

Opinion of the Court of Claims.

in the case of

Cicero L. Lincoln, Administrator of Joseph A. Harvey, Deceased, v. The United States.

(Decided February 9, 1914, 49 C. Cls., 300.)

Holding that allegation and proof of loyalty in fact are not required in claims for cotton under section 162 of the Judicial Code.

Howry, *Judge*, delivered the opinion of the court:

This is one of a large class of cases for the recovery of the proceeds of a certain lot of cotton which had been sold by Treasury agents and the proceeds placed in the Treasury of the United States. This cause and a large number of companion cases of a similar character arise under that section of the act of March 3, 1911, 36 Stats., 1087-1169, which appears in the Judicial Code as section 162 and which became effective January 1, 1912. The act is as follows:

"Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States' and acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds

to the owners thereof on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

The third section of the original act relating to the collection of abandoned or captured property contained the requirement that on proof of ownership of such property and of his right to the proceeds thereof the person claiming to be such owner should be entitled to the proceeds of his cotton; but on further proof to the satisfaction of the court that the person so claiming "had never given any aid or comfort to the present rebellion." The original act containing this provision was approved March 12, 1863, 12 Stats., 820.

The original and first amended petition not meeting these requirements defendants entered a motion to dismiss. This kind of a motion appears in all kindred cases where there appears to be a want of strict compliance with the act of March 12, 1863, above mentioned.

After the motion to dismiss had been made in the present cause a second amended petition was filed in which it appears to be alleged without qualification that the decedent at all times bore true allegiance to the Government of the United States. The allegation of the loyalty of the claimant administrator is left in the form in which it appeared in the first amended petition. Then follows the statement in the second amendment substantially that to the claimant * * * for any such cause of insurgency committed during the late Civil War, including service in the Confederate Army, a full pardon had been granted by the President of the United States.

Section 159 of the Judicial Code provides:

"Sec. 159. The claimant shall in all cases fully set forth in the petition the claim, the action thereon in Congress or by any of the departments, if such action has been had; what persons are owners thereof

or interested therein; when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that such claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney."

Section 160 of the Judicial Code provides:

"Sec. 160. The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed."

Defendants contend that if the Abandoned and Captured Property Act is revived by section 162 of the Civil Code it is revived in all its parts and that such act remains as of August 20, 1868, when the act ceased to operate by its own limitation; and further, that the only alteration made in said act is to permit the recovery of the proceeds of cotton taken and sold after June 1, 1865, regardless of the statute of limitations. The argument is that the averment of the loyalty provisions without qualification, as they appear in the Abandoned or Captured Property Act, is necessary under sections 159 and 160 of the code because the amnesty extended to persons participat-

ing against the Government can not control the power of Congress as to the grant or refusal to grant jurisdiction to this court.

The act under which all these cases have been brought does not relate to property taken under the proceedings confiscating property. The Confiscation Act of July 17, 1862, and the joint resolution of that date, was legislation for the confiscation of enemies' property. Forfeitures were provided, effective during the life of an offender, by this legislation. But even as to the confiscations provided for by that and other acts, the Supreme Court declared that the joint resolution had the same meaning as the constitutional ordinance, and that both sought to limit the extent of forfeiture proceedings. *Wallach* v. *Van Riswick*, 92 U. S., 202.

The confiscation acts, it has been held, were penal; the Abandoned and Captured Property Act remedial; the one claimed a right, the other conceded a privilege. For this reason these acts were construed not to be *in pari materia*, and could not be according to *Anderson's case*, 9 Wall., 67, where it was held that the confiscation laws were predicated strictly upon the right to seize and condemn property as a punishment. These two acts of Congress, the confiscation act of July 17, 1862, with the concurrent joint resolution, and the Abandoned or Captured Property Act, serve to emphasize the manifold duties and powers conferred upon this court and the necessity to apply different rules of interpretation and construction on the separate acts of legislation because the powers of this court are made up of different and distinct jurisdictions and the acts conferring these various jurisdictions have not been often contemporaneous. Congress have conferred jurisdiction by many statutes of a special nature quite foreign from the proceedings authorized under the general jurisdiction of the court, and for this reason general provisions cannot be applied indiscriminately.

Sections 159, 160, and 161 of the code are substantially the same as sections 1072, 1073, and 1074 of the Revised Statutes. All these statutes are general in their nature and within that class known in the law as personal statutes. True, they treat of property, but only incidentally. Personal statutes as denominated in the law are those which include the right of instituting suits with the correlative right to plead in person. The original statutes which are now brought forward to the Judicial Code were only personal disability statutes. As they appear in the existing law they disclose on their face to limit the jurisdiction of the court as against those only within their strict meaning. But as the Congress have brought forward in the work of codification the former statutes, the lawmakers must have intended that these sections should be executed as construed by the Supreme Court; that is to say, with the limitations imposed by the construction of that tribunal. Hence, proceedings under these statutes go on just as they have gone on since the decisions of the Supreme Court.

Section 159 is a reenactment, without material change, of the original statute. Section 160 is taken verbatim from the old statute. Section 161 is the same as the former statute except for the substitution of the words "Civil War" for the word "rebellion;" the insertion of the words "Confederate States" and the word "service," followed by the elimination of the provision making certain facts prima facie evidence of disloyalty.

The reenactment in the same words of a statute which has received an authoritative construction in practice gives rise to the presumption that such construction is satisfactory to the legislature unless plainly erroneous. *Copper Queen* v. *Territorial Board*, 206 U. S., 474.

The Court of Claims long ago declared that since the decision of the Supreme Court in the Armstrong and Pargoud cases "this court has not required

claimants to aver and prove their loyalty, although the language of the Revised States is that they shall set out in their petition that they have at all times borne true faith and allegiance to the United States, and have not given aid and comfort to rebellion in general, while the loyalty to be proved under the Abandoned and Captured Property Act to which those decisions referred, and the disloyalty pardoned by the proclamation of general amnesty, related to the late rebellion only." *White* v. *United States,* 19 C. Cls. R., 440. That decision had no reference to the proof of loyalty required in certain cases under the provisions of the Bowman Act, 22 Stat., 485, because of the necessity to allege and prove loyalty in fact under and by virtue of the jurisdictional requirement in Bowman Act proceedings. The history of the act of March 3, 1883, commonly known as the Bowman Act, shows that in that early period Congress was attempting to provide for the lawmaking bodies information of an advisory character only and strictly for people who had been loyal and as an ancillary aid for the information and action of the great departments of the Government.

The last-mentioned decision was followed by another cause wherein it was declared that since the proclamation of amnesty promulgated December 25, 1868, 15 Stat., 711, the loyalty of citizen claimants under sections 1072 and 1073 ceased to be a subject of inquiry in this court. *Officers of S. Carolina Troops* v. *United States,* 20 C. Cls. R., 21.

These decisions were rendered nearly 30 years ago. They have been acted upon ever since, not only in general jurisdiction cases but in other cases under special jurisdictional acts and in very many causes transmitted to the court for investigation either by Congress or from the departments. Loyalty *rel non* has been so much eliminated that no claimant within its influence has been barred within the period of limitation from prosecuting to judgment his cause in this court.

A brief reference to certain decisions seems proper to sustain the practice of the Court of Claims in regard to the matter of loyalty.

After some of the cases arising under the confiscation acts were decided, there came on to be heard by the appellate tribunal a number of cases under the Abandoned and Captured Property Act. Just here it is pertinent to note that the principle established in *Wallach* v. *Van Riswick, supra,* was reviewed and substantially reversed by a later decision of the supreme tribunal. The question presented in that case was whether the former owner of a confiscated estate could transfer by deed the suspended fee to the property. The court thought that Congress had passed the confiscation act of July 17, 1862, for the purpose of completely dispossessing the owner of all benefits in the property seized and had not intended to permit him to retain any right of conveyance; that the forfeiture while it lasted was so complete as to be a devolution upon the United States of the owner's entire right and that the provision regarding the duration of the forfeiture was introduced for the advantage of the children and heirs alone. But in *Jenkins* v. *Collard,* 145 U. S., 546, it appeared that the Jenkins property had been confiscated and purchased by Collard. Subsequently Jenkins transferred all his interest and estate in the property for a considerable sum with a covenant of general warranty, binding himself and his heirs. The conveyance was made directly to Collard, who had purchased under confiscation proceedings. The court was put in the position of having to settle whether the title conveyed was valid against the heirs of Jenkins. In disposing of the question of the reversionary right the court took the ground in the later decision that the former ruling imposing upon the offender the disability to transfer the reversionary right was based, not upon any express provision of law, but upon what the court thought the policy of confiscation to involve. In applying the law to the

question raised as to the character of the conveyance the Supreme Court decided that the offender by his covenant of warranty could convey a permanent future title good against the claims of the heirs of the grantor. But in this connection it is pertinent further to note that in the Jenkins case the Supreme Court took the occasion to declare that the general pardon and amnesty made by the public proclamation of the President at the close of the war *had the force of public law.* So there is no advantage to be gained by the argument made at the bar in the case we are now considering that the action of Congress was necessary to strengthen the validity and the effect of the presidential proclamations.

From the beginning there was a clear and necessary distinction between the acts providing for confiscations and acts providing for seizures because the objects, as we have shown, were different. In those later acts (which provided for seizures only) there was practically a bid to the owners of the property to yield because the passage of the acts authorizing seizures (particularly of cotton) were either contemporaneous with offers of amnesty or were quickly followed by special proclamations of condonation which meant a return of the proceeds of the goods taken if owners would take the oath.

The case we have just cited serves to show that even by means of proceedings *in rem* amnesty relieved the situation—so anxious was the United States to restore property if the terms were accepted by those in arms against the Government.

After some of the confiscation cases had been decided there came on to be heard by the Supreme Court on appeal from the Circuit Court for the Eastern District of Louisiana the case of *Armstrong's Foundry,* 6 Wall., 766. That was a libel of information charging that certain property in New Orleans, known as Armstrong's Foundry, had been seized and forfeited to the United States by reason of the use of the foundry with the owner's consent in aid

of the rebellion. This seizure was under the first confiscation act of August 6, 1861, 12 Stat., 319. Armstrong interposed his claim as the owner and plead the special amnesty of the President and his acceptance of the terms. This plea was rejected and the property condemned. While the appeal was pending Armstrong was permitted to plead as new matter the fact of full amnesty granted him, by name, with certain conditions and showing with his plea full compliance with the conditions. The effect of the special amnesty granted was considered to relieve the owner of the property of so much of the penalty as accrued to the United States.

This case was followed by that of *Padelford* v. *United States,* 9 Wall., 533. There the claimant had taken the oath of amnesty in January, 1865, under the terms of the proclamation of December 8, 1863. The Supreme Court declared that the pardon was sufficient to wipe out any imputation of disloyalty prior to the taking of the oath and that if claimant's cotton had been seized before the oath was taken the faith of the Government was pledged to its restoration when it also appeared that the oath had been taken in good faith. This decision made the proof of pardon a complete substitute for proof that the claimant gave aid and comfort to the rebellion.

Next came the case of *Klein* v. *United States,* 13 Wall., 128.

The proclamation of December 8, 1863, offered a full pardon, with restoration of all rights of property except slaves and that in which the rights of third persons had intervened; the next one was that of March 24, 1864, which was limited to a class; the third proclamation, of May 29, 1864, offered amnesty with restoration of property rights except slaves and that as to which legal proceedings had been brought by the United States and excepting certain classes of individuals; the next proclamation, of September 7, 1867, offered amnesty with restoration of property as before and on the same oath prescribed by

former edicts to all except three classes; the next was on July 4, 1868, which granted amnesty with some exceptions, and finally, on December 25, 1868, a proclamation came setting forth a full pardon and amnesty to all persons for adhering to their enemies during the Civil War, with restoration of all rights, privileges, and immunities. The court held that under the statutes referred to except that mentioned in the first section of the act of March 12, 1863, no titles were divested in the insurgent States unless in pursuance of a judgment in legal proceedings; that it was reasonable to infer that it *was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should come into the Treasury without change of ownership.* It was added that this was certainly the intention in respect to the property of loyal men and that the same intention probably prevailed in regard to the property of owners who though then hostile *might subsequently become loyal from the circumstance that no provision had anywhere been made for confiscation.* That case was notable because the court held that the Government had constituted itself the trustee for those who were by the act declared entitled to the proceeds of captured and abandoned property, and *for those whom it should thereafter recognize as entitled.*

In his dissent in Klein's case Mr. Justice Miller stated that he understood the opinion of the court to mean that the Government became the trustee of all the former owners, whether loyal or disloyal, and continued to hold the proceeds for the disloyal until pardoned by the President or until Congress ordered the proceeds to be returned. The judges dissenting from certain of the conclusions in Klein's case appear not to have differed from essentially the same results in the cases of Armstrong, Pargoud and Carlisle which immediately followed. The opinions appear to be unanimous in the three cases mentioned.

In *Mrs. Armstrong's case,* 13 Wall., 154, the court

found that she was not loyal. On appeal the Supreme Court held that the proclamation of amnesty dated December 25, 1868, was sufficient to enable that claimant to maintain her suit. The effect of this was to give Mrs. Armstrong the benefit of the amnesty granted after the efflux of the period in which the suit could be brought under the Abandoned and Captured Property Act. As a matter of fact, Mrs. Armstrong's suit was begun in time and she was given the benefit of a pardon which at the time of the institution of the suit had not been tendered.

In *Pargoud* v. *United States,* 13 Wall., 152, the petitioner averred no loyalty at all, but admitted insurgency, though claiming that he had been legally pardoned. This court dismissed the petition. On the appeal motion was made to dismiss under the proviso known as the Drake amendment to the act of July 12, 1870, set forth in Klein's case. The court held that the pardon of 1866 had the same legal effect as the general proclamation of December 25, 1868, mentioned in the case of Mrs. Armstrong.

In *Carlisle* v. *United States,* 16 Wall., 147, this court found that the claimants were the owners of certain cotton seized in 1864, sold, and the proceeds paid into the Treasury. But the claimant was a subject of Great Britain, who had given aid to the Confederate States. The Supreme Court said that it must be regarded as settled that the pardon, whether granted by special letters or by general proclamation, relieved claimants from the consequences of participation in rebellion and from the necessity of establishing their right in order to prosecute their claims. The appellate court stated that it could not suppose that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and that all general terms and statutes should be limited in their application, so as not to lead to injustice, oppression, or unconstitutional operation, if possible.

In *Haycraft's case,* 22 Wall., 81, the suit was instituted some years after the expiration of the period allowed for the bringing of suits for the proceeds of cotton. This was a suit brought to recover, *not the proceeds of cotton, but the value of the staple* at the time and place it was captured. The petition renounced any right of action under the Captured and Abandoned Property Act because claimant said in terms that he was a rebel and admitted that he had no rights to sue for the proceeds of his cotton until he was amnestied by the general proclamation of December 25, 1868, when the time for bringing suits for the proceeds had expired. This cause dealt with the meaning and effect of the statute itself which gave the right and offered a remedy. Because the remedy had expired it was determined that there was no jurisdiction *to enforce* the alleged right set forth in the petition for the value of the property.

In *Young* v. *United States,* 97 U. S., 39, it appeared that petitioner was a British subject engaged in fitting out blockade runners used to carry in munitions of war and carry out cotton for the Confederate States. The court held that the cotton found within Confederate territory was a legitimate subject of capture and title thereto passed to the Government as soon as the property was reduced to "firm possession." The acts of disloyalty prevented this alien from recovering for the reason that, being a nonresident, he was not within the terms of the amnesty. But the court approved the doctrine of the Padelford and other cases, and on the subject of title added that the capture of movable property on land transferred the same to the Government of the captor as soon as the capture became complete.

In *Knote* v. *United States,* 95 U. S., 149, the action seems to have been based upon the confiscation acts. The court held that there was no legal claim by anyone because there was no implied contract in the case. That case has nothing to do with this issue.

In *Erwin* v. *United States,* 97 U. S., 392, the court

held that where cotton was captured by the military forces of the United States and sold and the proceeds paid into the Treasury the claim of the owner against the Government constituted property which passed to an assignee in bankruptcy, though by reason of the bar arising from lapse of time the right could not be judicially enforced. That case was decided under a special act not intended to enlarge or affect his title to the claim, or to change his position in court from what it would have been had the suit been instituted within the two years prescribed by the special act. No point was raised against the status of Erwin arising out of his former connection with the Confederate Army, because the court said the disability thus created had been removed by the President's proclamation. The point in dispute related to the validity of the title on the contention that the claim against the Government for the proceeds of the cotton never passed to the assignee in bankruptcy and, if it did pass, the claimant afterwards became the owner of it by purchase of the assets at the sale mentioned. The court held that when the appellant filed his petition in bankruptcy his claim against the Government was property, though of uncertain value. That "it was a claim for the proceeds of goods which once belonged to him, and of the possession of which he had been deprived by the action of the Government. Whether this was done rightfully or wrongfully does not affect the character of the claim as property though it might affect its validity and value."

It is historical that there were changing and peculiar conditions affecting property in the cotton-growing sections during the progress of the war. At the outset the Confederate Government purchased cotton for sale abroad as the same could be exported, using the proceeds in exchange for supplies and munitions of war. Later, that government ordered cotton to be destroyed when in danger of capture. Meantime, the Confederate authorities were im-

pressing cotton far removed from capture when owners would not sell, giving in exchange the paper obligations of the experimental government. Some of the States issued cotton obligations and the domestic transactions in the sale and purchase never ceased. The United States, on the other hand, in the beginning did not invade the hostile section with any intent to deprive the people there of their means of subsistence or to appropriate private property of any kind except as stated under the confiscation acts. Referring to the rigid rule that by the laws of war the right of capture existed, the Supreme Court, in *Mrs. Alexander's Cotton,* 2 Wall., 419, said that, "This rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted to special cases dictated by the necessary operation of the war, and as excluding, in general, the seizure of the private property of pacific persons, for the sake of gain."

In almost the last decision relating to the seizure of cotton, *Briggs* v. *United States,* 143 U. S., 357, the Supreme Court cited with approval the language used in the case of *Mrs. Alexander's Cotton,* to the effect that, "No principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain, in case of the withdrawal of the Union troops, an element of strength to the rebellion."

The acts necessary to good order among citizens, including acts regulating the conveyance and transfer of property, and other similar acts valid as if emanating from a lawful government, have been regarded in general as valid when proceeding from an actual, though unlawful, government, though the court said acts in general in furtherance or in support of rebellion against the United States are regarded as invalid. *Home Ins. Co.* v. *United States,*

22 Wall., 99; reprinted 10 C. Cls. R., 154. This, of course, means voluntary acts.

The case of *Austin* v. *United States*, 155 U. S., 417, turned upon the construction of the proviso in a special jurisdictional act. The appellate court construed the special act to mean that there must be proof of loyalty in fact on the part of Austin as distinguished from loyalty in law. But no discredit was thrown upon the effect of the amnesty proclamation. Recovery was denied on the ground that a proclamation of amnesty could not control the power of Congress in giving or withholding jurisdiction.

Taking the decisions all together, we deduce the following:

(1) The proclamation of December 25, 1868, relieved all persons within its influence from the pains and penalties of disloyalty and from any offense whatsoever in aid of the Confederate States. It blotted out whatsoever offense there was against the Government as effectually in contemplation of law as if the persons to whom amnesty was given had never engaged in hostile service or aided or sympathized with the Confederate States.

(2) That the Abandoned and Captured Property Act granted jurisdiction to the Court of Claims and prescribed a right and a remedy. The remedy expired at the end of two years from the official declaration designating the time of the conclusion of the war, and when that period expired the jurisdiction ended alike to the loyal and the disloyal.

(3) During the time the Court of Claims had the right to exercise jurisdiction persons residing in the Confederate States who were loyal and persons who had not been loyal but were duly pardoned could sue alike for and recover the proceeds of their cotton in the Treasury seized under the act of March 12, 1863, by proof of ownership. Where suit was brought within the period limited persons who had been disloyal but who were subsequently pardoned by the general amnesty of December 25, 1868, after the close

of said period could use their pardon in aid of their suits if brought within the time.

(4) That Congress had plenary power at any time to authorize the payment of claims described by section 162 of the Judicial Code. It was and is, a matter of congressional policy to give, or not confer, jurisdiction, at discretion and, as said in Erwin's case, the character of a demand for the proceeds of cotton in the Treasury is a claim for property irrespective of whether the taking was rightful or wrongful.

(5) The funds in the Treasury derived from the proceeds of the sale of all abandoned or captured property *remain subject to congressional legislation* just as all other funds there are subject to congressional direction.

(6) That the amnesty in itself established proof of loyalty regardless of former status.

Have the Congress sufficiently exercised this plenary power by section 162 of the Judicial Code?

The function of the court is to seek the intention of the lawmakers and to apply the inferences arising from the subject matter, because every reasonable inference must control. In construing the section under consideration and to arrive at the intent, the court may recur to the history of the times to ascertain the reason for, as well as the meaning of, particular provisions of the act. *United States* v. *Union Pacific R. R.*, 91 U. S., 79; *Preston* v. *Browder*, 1 Wheat., 120; *Aldrich* v. *Williams*, 3 How., 24.

If Congress meant to apply other sections of the Judicial Code to section 162 (that loyalty as a fact was necessary to be proven by those aiding the Confederate cause), the act in question would have been purposeless. It would be an act on the statute book with practically no meaning, for the reason that the loyalists of the cotton-growing belts were known to have availed themselves of the remedy afforded them, and the matter of pardon extended to others would destroy the construction given by the courts

as to the effect of the proclamations of the President.

As showing the motives of the lawmakers, the court can also look to the occurrences surrounding the passage of the act known as the Bartlett amendment. Cong. Rec., 61st Cong., 3d sess., p. 2163. In *United States* v. *Craig*, 28 Fed. Rep., 798, the late Justice Brown (as district judge) declared that the motives and history of an act are matters of common knowledge. In *Holy Trinity Church* v. *United States*, 143 U. S., 463, this declaration was cited with approval. It was common knowledge that the war closed as a matter of fact, if not in legal contemplation, prior to June 1, 1865. That date was fixed in section 162 with knowledge that cotton taken from and after June 1, 1865, could not be used for any hostile purpose. With the dissolution of the remnants of the southern forces in April and the early part of May, 1865, the calm that came to the country was as profound as the hush that fell upon Europe when, after Waterloo, the Allies marched upon Paris and remained long enough to reestablish the dynasty of the Bourbons. Intention to afford relief to a class could not be more plainly implied. Intention of the makers of an act is as much within the act as if it were within the letter; for whatever is implied in a statute, pleading, contract, or will is as much a part of it as that expressed. *Babbitt's Case*, 1 Black, 361.

But sections 159 and 161 have some meaning. The general rule is that courts must give force and effect to all parts of a statute if possible. Another rule arises when there is ambiguity, and in such cases the character of the statute determines for a strict or liberal construction. Section 294 of the Judicial Code provides that—

"The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in

such statute, unless such change of intent shall be clearly manifest."

In *Sturges* v. *Crowninshield,* 4 Wheat., 202, Marshall, Ch. J., said it would be dangerous to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation; that where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. In the matter before us it was known to the lawmakers that the courts had granted relief to disloyal owners of cotton where the statute of limitations had not intervened by holding that proof of loyalty (as contradistinguished from innocence in law) was not essential to recovery. Amnesty became generally the substitute for the want of proof of loyalty.

In reenacting section 159 the intent can not be attributed to Congress to exclude disloyal claimants under section 162 or, for that matter, under any other act from the jurisdictions provided. Any such claimant may aver loyalty according to its legal effect without qualification or further averment. If the plea be traversed, and the claimant has committed an offense within the purview of any proclamation of amnesty, the pleading may then show the claimant's reliance upon the presidential proclamations. If the pleading sets up loyalty with the qualification, as in the present case, that amnesty had been extended, such plea is sufficient. Any petitioner declining to aver that he had at all times been loyal in fact, when at some time he had been disloyal in fact, brings himself within the meaning of the law by averring the qualification that he had committed acts which at one time were considered offenses, but which, by reason of presidential proclamations, had been blotted out.

In other words, where there is a general averment of loyalty without qualification, it devolves upon the petitioner either to prove the fact of loyalty or to plead the amnesty for whatever offense there was.

Congress have not undertaken to prescribe the evidence or the effect thereof on which the court may proceed to judgment where jurisdiction is granted. That was the ruling in Klein's case, *ante*. The language of section 159 is broad enough to include any violent opposition to the lawful authority of the Government, applies to aliens as well as citizens, and prescribes a certain general allegation relating as much to occurrences since the close of the Civil War as at any period before that time. In *United States* v. *Gear*, 3 How., 131, it was said that all statutes are perpetual unless limited to a particular time or until repealed by an act professing to repeal them, or by the necessary implication contained in clause or section of another act directly bearing upon the particular matter of the first act. Section 159 seems to have been reenacted as a permanent statute having for its object the desire to prevent rebellion against the Federal authority for all time.

Numbers of ex-Confederates now living would probably decline to take an oath unqualifiedly that they had at all times borne allegiance to the Government of the United States, because there is contained on the face of such a paper as much the statement of a fact as the recital of a legal conclusion resulting from the effect of amnesty. The court leaves this part of the case as it appears in the statement above.

In administering the Abandoned or Captured Property Act the Court of Claims may have to deal with cases where claims are made to funds in the Treasury from particular localities by conflicting interests, because the cotton from certain localities was intermingled after capture, the identity lost, and likelihood exists that the fund will prove insufficient to payy all in full. In such cases the court has the power to make the conflicting parties interplead

and then to marshal and distribute the assets *pro rata* among those claimants where the fund is found to be insufficient.

In the delay likely to be created to meritorious suitors there is cause to regret that section 162 does not contain a limitation of time within which all suits must be brought.

Defendants' motion to dismiss the petition is denied.

APPENDIX "B."

Opinion of the Court of Claims.

Cicero L. Lincoln, Administrator of the Estate of Joseph A. Harvey, Deceased, v. The United States.

(Decided January 11, 1915, 50 C. Cls., 70.)

Holding that a sale to the Confederate government is a bar to recovery in a claim for cotton under section 162 of the Judicial Code, even if the cotton remained in the hands of the vendor until after the surrender.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The claimant is the administrator of the estate of Joseph A. Harvey, deceased, late of Lowndes County, Mississippi.

II.

On April 22, 1863, said Joseph A. Harvey sold to the Confederate States of America 77 bales of cotton and received therefor bonds of the said Confederate States to the face value of $10,010. He executed a bill of sale as follows:

[Here follows bill of sale similar to that in Thompson v. United States, rec. pp. 1-2.]

III.

In May, 1865, the Secretary of the Treasury appointed Harrison Johnson as assistant special agent of the Treasury Department to collect certain cotton, the letter of appointment being as follows:

"Treasury Department, May 8th, 1865.

"It having been represented to this department that there is in the counties of Lowndes, Monroe, Oktibbeha, and Noxubee, in the State of Mississippi, *large quantities of cotton purchased by and now held on account of the so-called Confederate States Government,* and that the fact of such purchase can be fully established and the cotton identified, Mr. Harrison Johnston is hereby appointed an assistant special agent of the Treasury Department to receive and collect the same in the counties above named, and to forward it to agents of the department at Memphis or Mobile, as in his judgment is best for the interests of the Government.

"All officers and persons in the service of this or other departments of the U. S. Government are requested to give him all aid and facilities in their power to enable him to carry out the purposes of this appointment.

"(Signed) H. McCULLOCH,
"Secretary of the Treasury."

On the same day the Secretary of the Treasury ad-

dressed to the said assistant special agent a communication as follows:

"Treasury Department, May 8th, 1865.

"Sir: Under your letter of appointment of this date you are requested to proceed forthwith to receive and collect so much cotton in the counties of Lowndes, Monroe, Oktibbeha, and Noxubee, in the State of Mississippi, as can be satisfactorily shown to have been or which you are able to identify as purchased by or on account of the so-called Confederate States Government. You will with as little delay as possible ship the cotton so received or collected to William W. Orme, supervising special agent, at Memphis, or T. C. A. Dexter, supervising special agent, at Mobile, as can be done with the least expense and risk, sending forward with each lot an account of expenses (which will be paid by them), together with a full record of the cotton shipped, etc., as required by the fourth regulation concerning captures, abandoned, and confiscable personal property, copy of which is herewith enclosed for your guidance. You will confer or correspond fully and freely with the officers named above, and with other officers of the department, receiving and giving such information and suggestions as will best promote the business entrusted to you and the general public good, and advise the department as frequently as possible of your progress.

"Enclosed is the form of a bond which you will please have executed and returned to the department as early as convenient.

"Your compensation will be fixed in future and will depend in a great measure upon the result of your efforts, but it will be reasonable and liberal for the service performed.

"Respectfully,

"(Signed) H. McCulloch,

"Secretary of the Treasury.

"Harrison Johnston, Esq.,

"Asst. Special Agent."

IV.

Acting under the said instructions, the said assistant special agent caused to be taken from the said Harvey's possession, by agents of the United States Treasury Department in Lowndes County, Mississippi, on or about the 21st day of July, 1865, the said 77 bales of cotton, and the same were taken over the objection and protest of the said Harvey.

V.

[This finding unnecessary for pending issue.]

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed.

OPINION.

CAMPBELL, Ch. J., delivered the opinion of the court.

The claimant seeks to recover the net proceeds of 77 bales of cotton which it is alleged belonged to claimant, and were seized and sold by agents of the Federal Government subsequent to June 1, 1865, and the proceeds of the sale covered into the Treasury.

The suit is predicated upon the act of March 3, 1911, carried into the Judicial Code as section 162 and reading as follows:

"The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled 'An act to provide

for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and acts amendatory thereof where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

Said section refers specifically to the act of March 12, 1863, commonly called the abandoned or captured property act, which is not to be confounded with the enactments known as the confiscation acts. For, as said by Judge Howry in a former opinion in this case upon another phase of it: "The confiscation acts, it has been held, were penal, the abandoned or captured property act remedial; the one claimed a right, the other conceded a privilege. For this reason these acts were construed not to be *in pari materia*, and could not be, according to *Anderson's case*, 9 Wall., 67, where is was held that the confiscation laws were predicated strictly upon the right to seize and condemn property as a punishment."

By the abandoned or captured property act the Court of Claims was designated as the sole forum of original jurisdiction of suits brought under that act, and very many suits were brought by persons seeking to avail themselves of its privileges. As said by Mr. Justice Strong, in the *Elgee Cotton cases*, 22 Wall., 180, 185, "That statute [act of March 12, 1863] furnishes a complete system for the prosecution of claims under it, and defines the extent of the rights which those who claim an interest in the proceeds of property captured or abandoned during the Civil War, may assert against the Government. According to the well-known rules of statutory construction, the system is exclusive of all others, and the rights defined are the only ones which can be

enforced in any judicial proceeding. The language of the act makes it plain that no one is allowed to sue in the Court of Claims for the proceeds of captured or abandoned property unless he can prove to the satisfaction of the court three things: *First*, his ownership of the property seized; *secondly*, his right to the proceeds thereof; and, *thirdly*, that he never gave aid or comfort to the rebellion. The third, it is true, has been ruled by this court to be no longer necessary since the amnesty proclamations, but the ownership of the property at the time of the seizure and the right to the proceeds thereof are still indispensable to any standing in court as a claimant for the proceeds of property captured, which have been paid into the Treasury of the United States."

Many suits which had been brought failed because of the inability of the claimants to establish their loyalty before the general amnesty proclamation, and the period provided in the statute for the bringing of suits expired in two years from the termination of the war, which was officially declared to be ended on August 20, 1866. No suit could therefore be brought under that act after August 20, 1868.

The effect of section 162 is to revive the abandoned or captured property act so far as the remedies it provided are concerned and to again provide a forum for the enforcement of the rights declared in said section 162.

A very material requirement of said act of March 12, 1863, is now eliminated, namely, the proof of loyalty. (See former opinion in this case upon that question.). But aside from loyalty said statute made the right to recover depend on proof of ownership of the abandoned or captured property or of right to the proceeds. "The ownership to be proved is that which existed at the time of abandonment or capture and the right to the proceeds is that which existed at the time of the petition filed in the Court of Claims." *Carroll case*, 13 Wall., 151; *Ross case*, 92 U. S., 281; *The Elgee Cotton cases*, 22 Wall., 180.

But it does not seem to have been essential to recovery that proof be made of a legal title to the property which had been sold, for in *Villalonga's case,* 90 U. S., 35, a factor's lien was enforced to the extent of his advances on cotton belonging to his principal, it being declared in that case that the "owner" spoken of in the act, "having a right to the proceeds thereof," is he who has the legal interest in those proceeds. The factor was accordingly allowed to recover of the proceeds in the Treasury to the extent of his interest, which was measured by the amount of his advances on the cotton which had been sold.

And in *Erwin's case,* 97 U. S., 392, it was held that the claim to the proceeds in the Treasury would pass to an assignee in bankruptcy.

In one of the earliest cases arising under the abandoned or captured property act, *United States* v. *Klein,* 13 Wall., 128, the Supreme Court decided that, "The Government constituted itself the trustee for those who were by that act entitled to the proceeds of captured or abandoned property and for those whom it should thereafter recognize as entitled." Referring further to the act, it is there said, page 139:

"This language makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty. The property of the original owner is in no case absolutely divested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the Government, and restoration of the property is pledged to none except to those who have continually adhered to the Government. Whether restoration will be made to others or confiscation will be enforced is left to be determined by considerations of public policy subsequently to be developed."

This trust-fund doctrine was recognized in the *Vil-*

lalonga case, supra, Lamar v. *Browne,* 92 U. S., 187, and in *Intermingled Cotton cases,* 92 U. S., 651. Replying to the Government's contention that the plan of apportionment adopted in the last-named case was erroneous, the court, speaking by Mr. Chief Justice Waite, said: "The aggregate of the whole is no more than the amount of money in the Treasury to the credit of the fund, and which, as we have often decided, is a trust for the benefit of such as should establish their claim to it under the provisions of the abandoned or captured property act."

Construing section 162 as giving to designated persons the same right to maintain their suits which they would have had if they were loyal or pardoned persons suing under the abandoned or captured property act, there appear to be at least two fatal obstacles to a recovery by the claimant here.

1. The facts show that claimant had sold his cotton to the "Confederate States of America" and therefore he can not recover. This conclusion follows here not upon the theory that by his sale he committed a disloyal act toward the Federal Government, for that feature is eliminated, but upon the ground that he was not the owner of the property sold. The *Whitfield case,* 92 U. S., 165, concludes him upon this point.

[Portion of opinion omitted has no relation to the present issue.]

We think the view urged upon us that section 162 was intended to authorize parties who had sold their cotton to the Confederate States to sue for the proceeds of the sale of that cotton in the Treasury—or, in other words, that by the enactment of that section the Congress in effect intended the court to disregard the decision in the *Whitfield case*—is untenable.

We must construe a statute according to the plain import of its language, and the section in question is not susceptible of the construction that the "claims of those whose property was taken" who are later referred to as "the owners" of the net proceeds

means persons who had sold their cotton and were therefore not the "owners thereof" or of the net proceeds.

If the Congress had intended to change the effect of the *Whitfield case,* they could have used more apt language. While debates in Congress are not the appropriate source for ascertaining the intention of the act, we may at times refer to them for a history of the enactment; and so referring to the debates (vol. 46, Congressional Record, 61st Cong., 3d sess., p. 2163), it is shown that no reference was made to the *Whitfield case* or to "Confederate cotton." When we give to the language of section 162 the same meaning that similar words or phrases in the earlier act have been given, and eliminate from the latter any necessity for proof of loyalty and the period of limitation, we have given full effect to said section 162 unless the words of said section, "full jurisdiction is given to said court to adjudge *said claims,*" can be referred to any claim or lien which a claimant may establish and unless "property" as used in the said section is broad enough to include any legal or equitable right or interest in the property sold or its proceeds.

As above suggested, the abandoned property act authorized suit by "any person claiming to have been the owner" of the property seized and sold to recover the net proceeds of the sale covered into the Treasury. These net proceeds were in the nature of a trust fund held for those who could bring themselves within the terms of the act, or who might thereafter be authorized to maintain suits. *Klein's case,* 13 Wall., 128. "The right to the proceeds is that which existed at the time the petition was filed in the Court of Claims." *Carroll's case,* 13 Wall., 151. It was not necessarily a legal title to the property sold, but an equitable right in the trust fund, which was necessary to sustain the action, and a factor's lien was accordingly enforced to the extent of his advances upon certain cotton. *The Villalonga case,*

90 U. S., 35. In *Thomas's case,* 12 C. C., 273, Judge Nott, speaking for the court, declared that a suit under said act was "a suit in equity against a specific fund" partaking of a proceeding *in rem.*

Even if it should be conceded that the language of section 162 is broad enough to include claims of liens, the result here would not be altered.

Stating the proposition, to answer it:

It is said by Mr. Benjamin that where goods have not left the actual possession of a vendor he has at common law, at least, a lien for the unpaid price. 2 *Benj, on Sales,* fourth edition, section 1130, and the rule finds support in American cases. *McElwee* v. *Metropolitan Lumber Co.,* 69 Fed., 302; *Bohn Manufacturing Co.* v. *Haynes,* 83 Wis., 388; *Arnold* v. *Delano,* 4 Cush., 33; *Conrad* v. *Fischer,* 37 Mo. App., 352; *Cragin* v. *O'Connell,* 63 N. Y. Supp., 1071 (169 N. Y., 563); *Crummy* v. *Roudenbush,* 55 Minn., 426. The cotton in question was taken from the possession of claimant's intestate after June 1, 1865, under an order issued to the Federal agent to collect "cotton purchased by and now held on account of the so-called Confederate States Government." We need not consider any question of a vendor's lien because the *Whitfield case* concludes us.

The petition is dismissed.

Booth, *J.,* Barney, *J.,* and Atkinson, *J.,* concur in the foregoing opinion.

Howry, *Judge,* delivered the following concurring opinion:

There is no purpose on my part to dispute the authority of the case of *Whitfield* v. *The United States,* 92 U. S., 165. There is a purpose, however, to consider that case (with the respect which all courts owe to the appellate jurisdiction) in connection with other decisions of the Supreme Court relating to the seizure of cotton with reference to the class of cases (of which that at bar is one) pending in this court by and in behalf of those from whose possession cotton was taken after June 1, 1865, sold and the

proceeds put into the Treasury. And with the same degree of respect to the legislative branch to consider section 162 of the Judicial Code in order to determine its scope and effect; whether the act in question be so uncertain in its words as to confer or not confer rights and whether its language and necessarily implied meaning be such as to afford relief to the class of persons claiming the proceeds of cotton now in the Treasury, especially where the cotton had been taken from their actual possession. Probably not a baker's dozen of these numerous petitioners can recover if the act under which the suits have been brought be so interpreted as to require proof of all the things which the administrative part of the Government now claim is necessary.

The case of *Whitfield* v. *United States, supra,* was brought not only under the general jurisdiction of the Court of Claims but likewise under the other acts relating to the seizure of abandoned property. There is an allegation of loyalty in the Whitfield petition which, however, was not proven. When the cotton of Whitfield was seized in September, 1865, he remonstrated, which resulted in negotiations between him, claiming at the time to be owner, and a supervising special agent of the Government engaged in the seizure which ended in a contract with Whitfield and the Government for putting the cotton seized in good order with an agreement for the delivery of a part of the cotton to the United States and the other part to be retained by Whitfield as his property. That part of the cotton which Whitfield did not retain was shipped to market, sold, and the net proceeds paid into the Treasury. When suit was brought for the recovery of the proceeds of the sale of that taken away by the Government the court said that Whitfield sought to enforce a right growing out of his contract of sale with the Confederate States and that it was a contract which could not have been enforced against him because of "the vice of rebellion," and that Whitfield was equally powerless to

recover against others; that when possession of the cotton had been lost, no matter how, the courts would not afford relief against the loss. Recovery was denied as against the general principal that a sale upon credit implied a guaranty of the solvency of the purchaser until payment for the goods was made, the court at the same time declaring that such was not the position of Whitfield before the appellate court; *but if it were,* having lost his possession, he had no standing in court for relief. Thus the decision was made to rest upon petitioner's acts because of his having entered the lists against his rightful Government by reason of which he could not, if he lost, ask for the protection of the proper authority against what he had voluntarily done. The principal ruling of the court was made upon the proposition that as a contract which could not have been enforced against a combination of persons doing an illegal act, Whitfield was consequently powerless to obtain relief against others. In its last analysis the want of loyalty was the reason for denying the relief. The taint of what the court denominated the vice of rebellion was the basis of the refusal to permit recovery. But passing from the vital matter of loyalty, which was necessary to be proven under the captured or abandoned property act, the court adverted to the principle that a sale upon credit *implied a guaranty* of the solvency of the purchaser until payment.

The question of an implied guaranty of solvency of the purchaser was not in issue, because, the court added, that "if it were" claimant was without standing in the court because of his loss of possession. The constructive possession of the vendee was accordingly held to be higher than the actual possession of the vendor. Of course, this latter part of the decision ought not to be said to be merely academic, but it is reasonably safe to say that the failure on the part of the court to apply the general rule respecting liens on property sold where the purchaser

had failed by reason of insolvency to complete the purchase by making the necessary payment was not essential. Certainly the last point considered was the incident in the case. So far, however, as that phase of the matter was considered it was held that the lien could not be enforced by the courts of the United States because of the disloyal act of the petitioner in engaging to sell cotton for paper obligations of an aggregation of States held by the court of last resort to be not a *de jure* government, nor yet a *de facto* government, but a confederacy only, with belligerent rights in the prosecution of the war and with no right to issue paper or to acquire property in trade.

From the foregoing statement it will be seen that the decision went further than the confiscation acts in that there was punishment meted out to the person. The summary seizure and appropriation of the cotton amounted to forfeiture in that there was a denial of any opportunity to claimants in possession to be heard in defense in the courts after the seizure and before the sales. If there be no right to recover now the forfeiture has become final.

Under the confiscation act of August 6, 1861, the purchaser of condemned real property was held to take a fee because, as said in *Kirk* v. *Lynd*, 106 U. S., 316, the act had been aimed exclusively at the seizure and confiscation of that kind of property used to aid, abet, or promote rebellion. The offending thing was what the court designated as the insurrection. But the confiscation act of July 7, 1862, 12 Stat., 627, was accompanied by a resolution under which only a life estate could pass.

In *McVeigh* v. *United States*, 11 Wall., 255, it appeared that the property of a disloyal person had been seized and condemned; that the claim and answer of the owner of the property seized had been stricken from the files and the owner denied a hearing in the district court which decreed the condemnation. The appellate court declared that the liability and right

were inseparable and a different result would be a blot upon our jurisprudence and civilization; that the foundation of the proceedings was the alleged criminality of the owner of the property and questions of his guilt and ownership were fundamental and therefore necessary to be considered in judicial proceedings before any confiscation could ensue. How much greater the reason and necessity for affording one claiming to be owner of property to be given the opportunity to appear and defend where the taking and appropriation occurred after the close of hostilities and the weakening of a hostile force could not have been the object?

In *Corbett* v. *Knutt*, 10 Wall., 464, it was held that the sales or transfers prohibited by the confiscation acts "were null and void as against the belligerent or sovereign right of the United States to appropriate and use the property designated, but in no other respect and against no other party." Accordingly the United States could seize personal property of the Confederate States wherever found without reference to the confiscation acts or the abandoned or captured-property act. But this was a belligerent right directed against a title and where the exclusive ownership was in the Confederate states. When it was directed by the Secretary of the Treasury to seize and then to sell anything belonging to the Confederate States, with the proceeds to be covered into the Treasury, is it not reasonable to infer that the intention was to give to individuals an opportunity to submit their claims to the proceeds before some court? And if it be true that the sale to the Confederate States was condemned by law, which made the sale void, is it not yet true that the property involved in this suit was never seized as the property of claimant's intestate but as the property of the Confederate States? But the United States labeled the proceeds of the sales of all cotton as a trust fund. Under these circumstances it would seem that the rights of vendors were not destroyed unless their rights

were fixed by the status of the individual from whom it was taken because of his disloyalty, which barred any remedy, and not by his status, when loyalty was no longer involved and the jurisdictional period of the original statute became extended by section 162.

Cases have been decided by the Supreme Court where effect was given to the general amnesty proclamation of December 25, 1868, and where disloyal claimants were allowed to maintain suits under the abandoned or captured property act *which had been brought prior to the proclamation of amnesty and prior to the expiration of the terms of the act itself.* In *Mrs. Armstrong's case,* 13 Wall., 154, and in *Pargoud's case,* 13 Ibid., 156, the pardons became retroactive, reaching back because of the obliteration of the offense. Those decisions clothed both of the claimants there with an innocency in law which they did not possess when their suits were brought or when the act itself expired and they could not sue. As the time for bringing suits is now extended, does not the proclamation mentioned so operate as to effectuate the same result in the case at bar as in the *Armstrong* and *Pargoud cases?*

There is another phase of the *Whitfield case* which seems to have been overlooked; or if not overlooked, ignored.

The action was instituted July 25, 1868, and about a month before the bar of the statute of limitation had accrued. But none except the loyal could possibly recover under the original abandoned or captured property act, or under any other act because, for the purpose of obtaining judgment against the United States the act authorizing suits for the seizure of property abandoned or captured was exclusive. Hence, Whitfield relied upon the allegation that he was not within the proscribed class who were not loyal and therefore could not recover, but upon the contention that he was among the favored class of loyalists who were entitled to recover. True, there was another and further allegation "that on

account of small gifts and acts of hospitality to soldiers and sailors' families not intended to promote or encourage the war he felt it safest to ask of the President the pardon and amnesty which he received, in the form of a pardon, accepted and took the oath required, all of which appear in the archives of the Government." It does not appear that the petitioner did more than acknowledge the receipt of a warrant of pardon. Whether he took the oath of allegiance like thousands of others, including those who had been in the military service of the Confederate States and who had taken the same oath about the same time they were paroled, does not appear. The pardon itself not being produced, its special terms and limitations can not be stated. While petitioner probably did take the oath of allegiance, yet the President's general proclamation of amnesty was not issued until some months after the Whitfield suit had been brought. Whitfield was therefore not within the terms of the general amnesty when he brought his suit.

In a leading early decision shown by the Supreme Court to be predicated upon the rules of international law war gave only the power for governments to confiscate, but does not itself confiscate the property of an enemy. Chief Justice Marshall, in the case of *Brown* v. *United States,* 8 Cranch, 143, declared this rule as stated, and said that the rule had never been changed. But he added that war, meaning the acts of the belligerent powers, *did not itself confiscate the property of an enemy;* that the rule was based on the opinion of all who had ever written on the *jus belli,* and that "the power to confiscate enemy property was confined to the legislature." Later the Supreme Court affirmed this principle in the case of *Mrs. Alexander's Cotton,* 2 Wall., 419, by saying that "from usage, from the reasonings of enlightened publicists, and from judicial decisions, the seizure of property on land was to be regarded as substantially restricted to special cases dictated

by the necessary operations of the war, and as excluding in general the seizure of private property *for the sake of gain.*"

Following this rule the United States disclaimed the intent to confiscate personal property, except as stated by the confiscation acts, which, as the court subsequently declared, were acts providing for judicial proceedings where parties could be heard to defend before condemnation.

A different question arises in cases of conquest by a government against another as it relates to actual ownership and possession of property belonging to the conquered public enemy. In such cases the property of an enemy government and in the possession of such enemy, nation, or state, reverts to the conqueror. Judicial proceedings are not necessary to pass title in such cases. Private rights of ownership stand upon a wholly different ground.

There was a constant disclaimer on the part of the Federal authorities that there was any intent to confiscate the private property of individuals anywhere. The true intent found expression in those acts relating to confiscation which were aimed and directed at the leaders of the secession movement. In the crisis of the Civil War assurances were extended to loyalists to remain faithful, and those not loyal were urged to become so when the great issue hung in the balance. It is historical that President Lincoln reluctantly approved the acts relating to confiscation and which, by reason of the existing confusion, were enforced in the most limited way. A veto message of proposed confiscation proceedings was understood to have been prepared by the President. *National Intelligencer,* July 18, 1862; *Senate Journal,* 37 Cong., 2d sess., July 17, 1862, pp. 872-874. In the case of *Conrad* v. *Waples,* 96 U. S., 279, it was held that confiscation under the act of July 17, 1862, applied only to the property of persons who *might thereafter* be guilty of acts of disloyalty. It was a curious result that financially confiscation was a fail-

ure, and as a measure of punishment equally insufficient to accomplish any useful purpose because of the subsequent judicial interpretations that a "rebel" could not be denied the right to a hearing upon the seizure of his property. Only the property of a few leaders was seized whilst those in arms and noncombatants very generally suffered and particularly those who were cotton owners.

The seizure of property as a belligerent right was presented to the Supreme Court after the close of the war in a number of decisions.

Though it was held in the case of *Miller* v. *United States,* 11 Wall., 268, that in a recognized great war those engaged against the Government were to be regarded as "enemies," the severe principle for appropriating private property disappeared. In the case of *Williams* v. *Bruffy,* 96 U. S., 176, the Supreme Court, in referring to the necessity of some concession to belligerent rights, declared that such concessions depended upon considerations of justice, humanity, and policy controlling the Government. This decision placed Confederate soldiers and military officers on the footing of those engaged in lawful war and exempted them from liability for acts of legitimate warfare. In this last decision the Confederate Government was distinguished from each kind of the defined *de facto* governments. The court said that when its military forces were overthrown it utterly perished, and with it all its enactments. The Confederacy, not having been either a *de jure* or a *de facto* government and the matter of loyalty having been eliminated when the recent legislation was enacted, can it not be reasonably supposed that with knowledge of these conditions and the reason for seizing cotton after June 1, 1865, being no longer necessary because of the collapse of the Confederacy, the Congress framed the act under which these cases are brought with the intent to have the appellate court review its decisions in the light of all the history of that period? In the case of *Briggs* v. *United*

States, 143 U. S., 346, the seizure of cotton was considered the great means of procuring supplies to carry on the war. Congress knew that the Supreme Court had sustained the liberal view in the case of *United States* v. *Klein,* 13 Wall., 168, following *Padelford's case,* 9 Wall. 56, in the statement that the legislative bodies had intended to restore property not only to loyal owners, but to those who had been hostile and might later become loyal; that the restoration of property to all real owners claiming under the abandoned or captured property act became the duty of the Government, and such restoration was the absolute right of the pardoned persons, the Government having constituted itself the trustee, not only for claimants protected by the act of 1863, but for all who might later be recognized as entitled. Pardon and restoration of political rights, said the appellate court, in these cases were in return for the oath of allegiance and its fulfillment.

But unfortunately *Klein's case* was not decided until after the period had expired for bringing suit, and that probably afforded Congress another reason for reviving the original act in the light of these decisions.

In the case of *Mauran* v. *Insurance Co.,* 6 Wall., 14, it was substantially declared what we all know—that the Confederate power, notwithstanding its illegal character, impressed its will over eleven States. Whatever kind of government it was, the citizens of these States had to trade with it, and had to use its paper obligations with each other and with the Confederate authorities. The nonintercourse laws could not be applied to the cases of citizens of those States within the Confederate lines if they resided there. May not Congress by the act of 1911 have had in view those decisions which decided that there was no power in the Government of the United States to continue to take property temporarily for the purpose of destroying the credit of the hostile forces in the absence of a legislative declaration confiscating

it? And may not those bodies have thought that the Secretary of the Treasury was without lawful authority to bring into practical operation acts of confiscation by a mere order, there being no belligerent power in existence? Even if a department order was given in May, 1865, may not Congress in adopting section 162 of the Judicial Code have been actuated by the intent to afford relief because there was no necessity to make seizures when hostilities had ceased and peace had been practically restored?

In the case of *Texas* v. *White,* 7 Wall., 700, the court held that legislative acts intended to give effect to ordinances of secession were absolutely null, but the State did not cease to be a State, nor her citizens to be citizens of the United States. In *Home Ins. Co.*, 22 Wall., 99, the court declared the validity of judicial and legislative acts touching the civil government and the regular administration of the laws so as not to loosen the bonds of society when not hostile in their purpose, *"and did not impair the rights of citizens under the Constitution"*; and, tried by the rule acts of incorporation in the States were treated as valid. The obligations of the seceding States and of the Confederate States constituted illegal issues of money, but citizens living there were obliged to trade exclusively in the moneyed obligations of the Confederate States.

In *Brown's case,* 20 Wall., *supra,* it was declared by the Supreme Court that enemy's property found on land could be seized *and condemned as* a necessary consequence of war, but the court in that case held that such property could not be condemned without an act of Congress authorizing its confiscation. The right remained with the private owner until the sovereign authority chose to bring the matter of condemnation into operation, and until the legislative will was expressed no power of condemnation could exist in the courts. This was but the declaration of the rules of international law respecting belligerents' property.

The amnesty extended just after the time for the filing of suits under the abandoned or captured property act condoned "all offenses" by the disloyal, arising from participation, direct or implied, conditioned upon the offender making no claim to property or the proceeds of any property sold "by the order, judgment, or decree of a court under the confiscation laws." The pardon, said the court in *Carlisle's case,* 16 Wall., 153, "relieved claimants of the proceeds of abandoned or captured property *from the consequences of participation* in the rebellion."

Amnesty, the court declared, "forever closed the eyes of the court to the perception of previous disloyalty as an element in its judgment, no rights of third parties having intervened." Loyalty or disloyalty being eliminated and the nonintercourse laws being without application the whole matter comes down to the proof of ownership and the right to be reimbursed by reason of the lien or charge against the property where the proceeds of sales were placed in the Treasury.

Section 162 does not dispense with proof of ownership and could not with reason have done so, because Congress never intended to provide for anybody but owners. In reviving the original act Congress had knowledge that the proceeds of sales were yet held in trust, and those bodies probably concluded that with the loyalty phase of the matter eliminated there was no necessity for legislation to be more explicit. The Supreme Court had declared in terms that the proceeds of sales constituted the trust fund, which impliedly meant that at some future time remedies might be provided so as to dispense with proof of loyalty. This implication results from the statement of the court that the property of the original owner was in no case absolutely divested. Taken in connection with the suggestion that confiscation was repudiated by the Supreme Court it is proper to say that future remedies were deemed by the appellate court as probable.

The case of *Semmes* v. *United States,* 91 U. S., 23, involved the seizure and condemnation of land under the confiscation act of July 17, 1864, and it was held there that the special pardon would not restore rights to property sold under a decree of condemnation as against a purchaser in good faith and for value. That was a case where the special pardon contained the provision that the claimant should not claim any property or the proceeds of any property that had been sold by the judgment or decree of a court of the United States. In the subsequent case of *Wallach* v. *Van Riswick,* 92 U. S., 213, the court spoke of the anomalies growing out of congressional legislation similar to the anomalies growing out of certain statutes in Elizabeth's time; and in answer to the suggestion that the proclamation of amnesty restored rights of property declared that "conceding amnesty did restore what the United States held when the proclamation was issued it could not restore what the United States had ceased to hold." The state of affairs in these two cases was not the same as in the class of cases we are now considering, because the owners of the cotton seized had not forfeited their right to recover the proceeds in the Treasury arising from the sales of cotton. These proceeds can be made to take the place of the property originally taken and not yet declared forfeited. The power of Congress over the fund is as good now as it was when the original abandoned or captured property act was passed; and Congress can have the fund administered by the courts by suitable legislation at any time.

The Supreme Court in *Whitfield's case* suggested that the petitioner there sought "in effect" to recover the purchase money never paid to him by the Confederate States upon the principle that a sale upon credit implied a guaranty of the solvency of the purchaser until the payment was made; that by reason, however, of having lost possession, Whitfield had no standing in court for relief; and denying the

right of ownership, the court declared that his lien was not one the courts would enforce, though the court did recognize the general principle of a vendor's right to enforce his lien because of the insolvency.

My comments relate to what the court stated to be the right to recover under the abandoned or captured property act; and, of course, do not embrace any other question independent of that act.

A buyer is deemed to be insolvent who either has ceased to pay his debts in the ordinary course of business, or apparently can not pay his debts as they become due. *Chandler* v. *Fulton,* 10 Tex., 2, 12; *O'Brien* v. *Norris,* 16 Md., 122, 132; *Durgy* v. *O'Brien,* 123 Mass., 12; *Tuthill* v. *Skidmore,* 124 N. Y., 148; *Queen* v. *Sadler's Co.,* 10 H. L. C., 425; *Toof* v. *Martin,* 13 Wall., 47; *Herrick* v. *Borst,* 4 Hill. 653; *Lee* v. *Kilburn,* 3 Gray, 600; *Benedict* v. *Schaettle,* 12 Ohio St., 515, 519; *Bloomingdale* v. *R. R. Co.,* 6 Lea, 616, 621. And it was substantially held that in the proof of insolvency it makes no difference as to how it came about. The insolvency necessary to be proved is to show reasonable certainty as to inability to pay debts as they fall due. *Biddlecombe* v. *Bond,* 4 A. & E., 332; *Hays* v. *Mouille,* 14 Pa. St., 48, 52; *Naylor* v. *Dennie,* 8 Pick., 205; *Durgy* v. *O'Brien,* 123 Mass., 13; *Secomb* v. *Nutt,* 14 B. Mon., 324; *Reynolds* v. *R. R. Co.,* 43 N. H., 580, 592; *More* v. *Lott,* 13 Nev., 376, 383; *Crummey* v. *Raudenbush,* 55 Minn., 426, 428; *Atwater* v. *Bank,* 152 Ill., 605. By implication of law a lien on goods continues for the price notwithstanding the property in the goods may have passed to the buyer *so long as the seller is in possession.* The authorities, English and American, are numerous on this point. An unpaid seller having in custody the goods sold and retaining actual possession of the goods as against a buyer may yet enforce his lien in case of the buyer's insolvency before the maturity of the obligation given. *Arnold* v. *Delano,* 4 Cush., 33; *Milliken* v. *Warren,* 57 Me., 46; and see

Miles v. *Gorton*, 2 Cr. & M., 504, 512; *Gunn* v. *Bolckow*, L. R. 10, Ch. App., 491, 503; *Moses* v. *Raisin*, 14 Fed., 772, 774. The authorities cited in the opinion of the court establish the doctrine of liens in cases of insolvency at common law and as said in *Benjamin on Sales*, the lien for the unpaid price finds support because the transaction was one between common belligerents against the United States.

The crux of the Whitfield decision and of some analogous cases to it was the aid given to the rebellion. The act of disloyalty which barred recovery in all cases was the disloyalty named in the original abandoned or captured property act. The act of disloyalty precluding the right to recover in those cases where recovery has been denied is not now to be recognized because of the general amnesty removing all taint of disloyalty.

In the case of the *United States* v. *Villalonga*, 90 U. S., 42, the Supreme Court affirmed the limited ownership in such cases with the right to assert the same as "a lien or charge upon the property"—excluding consignors through a factor where the consignors had given aid and comfort to the rebellion. The court in that case was dealing with the original abandoned or captured property without reference to the effect of amnesty.

The general contentions of the Government in this and kindred cases are that the bar of the statute of limitations only is waived; that section 162 of the Judicial Code did not enlarge the scope of the original abandoned or captured property act which provided only for the relief of loyal owners who could trace the money derived from sales to the Treasury. The effect of these contentions is that the act is almost wholly destitute of any meaning and but an idle and misleading piece of legislation. The defense consequently rests upon the fact of disloyalty and that not only is ownership not proved but the right to enforce the lien or charge upon the property as in ordinary cases can not be enforced because of the

seller's participation in the rebellion. It is contended that this is so notwithstanding there may have been a failure of consideration.

The question naturally arises, Did Congress act upon the belief that there could be no grades of disloyalty? Legislating with knowledge that there was nothing left from the wreck, outside of lands and some live stock, except a few thousand bales of cotton in that section; that much of the staple had been burned by the Confederate authorities to keep it from falling into the hands of the Union forces; that practical peace existed and all claimants were loyal; that confiscation laws and previous legislation in the nature of confiscation acts were no longer sought to be enforced; and finally, with knowledge that the Secretary of the Treasury, afterwards Chief Justice Chase (supported by many publicists, statesmen, and jurists), in the beginning directed seizures of cotton but subsequently took the ground that there was no consideration paid to private owners who had been in hostility, did Congress go to the trouble of enacting something its able membership knew had no meaning beyond the removal of the bar of the statute of limitations? Congress could not—and did not—attempt to remove the effect of the amnesty proclamation.

Congress knew from official reports before the act of 1911 was passed that about all the proceeds arisin from the sales of cotton seized after June 1, 1865, were proceeds which had been derived from the disposition of cotton seized as the property of the Confederate government. The order to seize cotton after the close of hostilities included only that of the extinct government, or those forfeiting title by the disloyal act of selling or subscribing property to the insurgent organization. At the same time the United States denied that the organization known as the Confederate States could lawfully acquire, possess, or convey any description of property. (Instructions of the Secretary of the Treasury (McCul-

loch) to the General Agent of the Treasury Department.) Did Congress by its latest legislation intend that property taken after the fall of the hostile power and as late as June 1, 1865, should be appropriated permanently for the use of the United States?

Where the language of a statute is ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defects which the statute was intended to remedy, to determine the intent. That which is implied in a statute is as much a part of it as what is expressed. *United States* v. *Babbitt*, 1 Black, 55; *Gelpecke* v. *City of Dubuque*, 1 Wall., 175; *County of Wilson* v. *National Bank*, 103 U. S., 778. In *Sturges* v. *Crowninshield*, 4 Wheat., 202, Chief Justice Marshall said that the spirit of an instrument was to be respected no less than its letter. A notable application of this is found in the case of *Church of Holy Trinity* v. *United States*, 143 U. S., 462. In *Bernier* v. *Bernier*, 147 U. S., 242, the court held that when a statutory provision admits of more than one construction that one will be adopted which best serves to carry out the purposes of the act. It is a rule often applied that the importance of rights involved forbids technical or narrow construction. In *United States* v. *Saunders*, 120 U. S., 126, the court thought that the construction must be measured not only by its exact words but by its apparent general purpose. In *United States* v. *Goldenberg*, 168 U. S., 95, the court held that where cogent reasons existed for the belief that the language used does not fully and accurately disclose the intent, specific language must yield to arrive at the true intent. It is enough to stop here with these familiar rulings on the general principle which charges courts with the duty of ascertaining the intent and all the circumstances surrounding the passage of an act.

As to the immediate case in hand, the plaintiff is not entitled to recover independent of the matter of ownership or of any lien or charge, because the pro-

ceeds of the sale of the cotton taken from the decedent have never been traced and can not be identified as a part of the fund in the Treasury. Besides, the *Intermingled Cotton cases,* 92 U. S., 651, operated as a bar to any remedy to recover the indistinguishable proceeds from any sales made of the intestate's cotton, inasmuch as such proceeds as reached the Treasury are payable as the amount of each can be ascertained. The interests of others to be recognized by an apportionment of the fund require that equity should consider the cases where the proceeds can be traced all together, and to that end it would be necessary to consolidate the cases of all claimants having an interest in the specific fund.

As to the general question involving the matter of ownership and the right to enforce the lien or charge as at common law in this and kindred cases where there is sufficient proof, the court can not make the law different from that declared in the Whitfield decision. Whether Congress expected the appellate court to modify the rule declared in that case because of the other decisions rendered by the same tribunal must be left to the Supreme Court to determine.

Whatever the Congress intended or expected is a matter of conjecture. But in any event it is necessary for this court before we can proceed further to have the questions in issue settled either by the appellate court or by further legislation.

For the reasons stated in this and the court's opinion I concur in the order directing that the petition be dismissed.

APPENDIX "C."

"Men and Measures of Half a Century,"

By Hugh McCulloch.

[Pp. 234-235.]

"The most troublesome and disagreeable duty which I was called upon to perform was in the execution of the law in reference to the property in the Southern States, which had been captured by the Federal armies, or was owned or controlled by Confederate government, or abandoned by its owners. All such property as was found within the Federal lines, as the war progressed, and in any of the Southern States after the war was ended, became the property of the United States, and it was the duty of the Treasury Department to adopt rules and appoint agents for its collection. Rules had been prepared and agents had been appointed for this purpose during the war by my predecessors, Mr. Chase and Mr. Fessenden. At the close of the war the field was greatly enlarged, and new rules, and a much larger number of agents were required. The preparation of rules which should strictly define the duties of the agents was a difficult matter, but this difficulty was small in comparison with that which was encountered in keeping the agents up to, and yet within, the line of their instructions. As they were to be paid for these services by a commission on the property which they collected and secured, there was a strong temptation for them to take possession of property which had not been owned or controlled by the Confederate government; while on the other hand, the Southern people were still more strongly tempted to claim as their own, or to conceal, property which was liable to seizure. Thus while the agents were disposed to regard all property which they could reach (it was chiefly cotton) as belonging to the United States, the people, or most of them, were disposed to claim as their own private prop-

erty that which had been bought and paid for by the Confederate government.

"For some time after the war was ended, the Southern States were in a disorganized condition. The Confederate Government having been overthrown, there was no governing power except the Federal military power, and this did not extend much beyond the territory occupied by the Federal troops. Everywhere else there was an absence of recognized authority to which appeal could be made for the protection of private property or for the protection of the Treasury agents in the performance of their legitimate duties. In these circumstances a good deal of Confederate property was undoubtedly '*spirited away*' (as its disappearance from accessible places was called), and not a little was seized by the agents to which the United States had no claim. As it was my duty to execute the law fairly—to protect the interests of the Government without doing injustice to claimants—I was compelled to give a great deal of time, by night as well as by day, to the investigation and decision of claims upon the Government by real or pretended owners, and that too, when other business of the greatest importance demanded my constant attention. When individual claimants were clearly right, the property was surrendered. When there was a reasonable doubt as to the ownership, it was retained, and the claimants were left to prosecute their claims in the courts."

APPENDIX "D."

"After the War: A Southern Tour, May 1, 1865, to May 1, 1866."

By Whitelaw Reid.

[Pp. 207-211.]

"Cotton was beginning to come out, but the enormous frauds which have since made the very name of cotton agent generally odious were then only in their

infancy, and there is no reason to suspect that at that time the Mobile agent already referred to, who subsequently gained such a disgraceful notoriety, contemplated any other rascality than a swindle of the 'Rebel holders,' that should still seem technically honest in the showings to the government.

"But the germ of all the difficulties had already made its appearance. There were, as the officials believed, in Mobile itself, six thousand bales, and in the adjacent country not less than one hundred and twenty thousand, which the captured records showed to be the property of the Rebel Government. Much of this was soon in the hands of private parties, who professed to have bought it from the Rebel authorities in good faith, to have given adequate compensation for it, and therefore to be now its legitimate owners. What was to be done in such a case? Or again: Planters had subscribed large amounts of cotton to the Rebel loan, under the same species of coercion by public sentiment which filled the Rebel ranks with men who had sturdily voted against secession in all its stages. The authorities had never removed the cotton; the former owners had been compelled to take care of it; they had steadily kept possession of it all the time; and they now claimed this possession to constitute ownership, arguing, plausibly enough, that their compulsory contracts (by subscription) with the Rebel government had never been carried out; and that now it ill became the United States government to undertake their enforcement. In other ways, and by all manner of side issues, the subject had become so inextricably complicated that the immediate representative of the Treasury Department in our party was at his wits' ends.

"Naturally, Mr. Chase's opinion had great weight, and it was freely given. He thought it wiser and better for the department over which he had presided, and which was now administered by one of his own most trusted appointees, to wash its hands of the whole business. Here was a quantity of cotton promised under compulsion to the Rebel government.

They never came to take it; in most cases it was never actually in their possession; it was now in the hands of its old owners. It would better comfort with the dignity of a great and successful nation to leave it among this impoverished people, rather than enter into a confused scramble against ready swearers, and men who felt that they were being cheated out of their all, in order to gather up and auction off the beggarly effects of the bankrupt Confederacy. In any event, the government would be apt to realize very little from the effort, and it would lose far more in a wasted opportunity for diffusing good feeling and promoting the revival of industry than it would gain in cotton.

"Weeks, indeed, before this, while the party was at Key West, Mr. Chase had foreseen, from the indications along the Atlantic coast, the troubles in store, and had suggested what seemed to him the wisest policy for avoiding them. He would have had the President issue a proclamation setting forth substantially:

"1st. That all present holders of cotton sold or subscribed to the Confederate government, but never delivered, should be recognized as its lawful owners, on the ground that the consideration for the stipulated transfer had failed.

"2d. That a general amnesty should be granted to all persons willing in good faith to take the required oaths and aid in the re-establishment of civil government; and that the Executive influence should be given for the repeal of all confiscation laws.

"3d. That this (which should be done, in order to show the Rebels now returning to their allegiance, that the government was magnanimous and not mercenary, as well as to relieve the general distress, and aid in the revival of industry and the return of prosperity,) must be accompanied or preceded by the adoption of fundamental laws in the States thus generously dealt with, which should permit no distinction of rights based merely on color; that thus the

principal source of trouble in the future might be avoided.

"Time will show—indeed, most men will agree that it has already shown—the wisdom and statesmanlike sagacity of the views thus early presented to the consideration of the President. That they would have been gladly accepted by the South, every man who saw the temper of the Rebel States in the May and June following the surrender is well assured. How much political embarassment and pecuniary corruption their adoption would have saved can only be told by those who have probed to the depths the festering corruption of the cotton agency system, and who can forecast the issues of the present Congressional and Executive complications.

"I speak advisedly in saying that every Rebel State would have promptly reorganized under such conditions, and that the majority in Congress would have as promptly admitted their representatives.

"But, so far as the political points were concerned, they had been adversely decided at Washington. As to the question of cotton, Mr. Mellen, in whose charge the entire matter was placed, without controverting the views above suggested, was unable to accept and act upon them. His instructions contemplated making the most out of the captured cotton. To give it away would at once be denounced as a corrupt waste of great sums of the public money. It was replied that this cotton was not the same as public money or even public property now in hand; and that it was not actually captured; was scattered over hundreds of miles of territory; was only known by uncertain records to have been subscribed to the Rebel Government; could not be found without protracted search, nor without protracted examinations in each case, which opened up boundless opportunities for bribery and wholesale frauds; in short, that no effort could be made to collect this cotton which would not end with little profit and less credit to the Government.

"Mr. Mellen earnestly desired to do the right

thing. Much abused as he has been, I have never seen an official charged with such weighty responsibilities, and so liable to slanderous accusations, whatever course he should take, who seemed more earnestly and sincerely bent on simply finding out his duty, and then doing it with his whole mind and heart. But as to the general policy of making the most out of the effects of the Rebel Government, whatever might be his own opinions, his instructions left him no discretion.

"The work of cotton seizure therefore began. Before these records of Southern travel are finished, there will be ample opportunity to tell how it ended."

APPENDIX "E."

Extracts from pamphlet entitled "Acts of Congress and Rules and Regulations Prescribed by the Secretary of the Treasury in Pursuance Thereto, with the Approval of the President, Concerning Commercial Intercourse With and In States and Parts of States Declared in Insurrection, Captured, Abandoned, and Confiscable Property, the Care of Freedmen, and the Purchase of Products of Insurrectionary Districts on Government Account."

This pamphlet is reprinted as an appendix to H. R. Report 1820, 53d Congress, 3rd Session.

[P. 137.]

"Circular Letter of Instructions to Officers of the Treasury Department, Relative to Commercial Intercourse, Captured, Abandoned, and Confiscable Property, Freedmen, Etc.

Treasury Department,
June 27, 1865.

The various rules and regulations heretofore prescribed by the Secretary of the Treasury, in regard

to the above-named subjects, having been rendered nugatory in whole or in part by the changed condition of affairs in the Southern States and Executive orders and proclamations, and the War Department having assumed charge of freedmen, abandoned lands, &c., under the provisions of the act of Congress approved March 3, 1865, the following instructions as to the duties of officers of the Treasury Department in the premises are prescribed, and will be regarded as in full force and effect immediately on the receipt thereof by any officer whose action is in anywise affected thereby:

* * * * *

"4. Officers of this Department charged with the duty of receiving and collecting, or having in their possession or under their control captured, abandoned, or confiscable personal property, will dispose of the same, in accordance with regulations on the subject heretofore prescribed, at the earliest time consistent with the public interests, and will refrain from receiving such from military or naval authorities after the 30th instant.

This will not be construed, however, as interfering with the operations of the agents *now* engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records, &c., delivered to the United States military or Treasury authorities, by rebel military officers or cotton agents."

[Page 148:]

"INSTRUCTIONS CONCERNING THE COLLECTION OF CAPTURED, ABANDONED, AND SURRENDERED PROPERTY, ISSUED SUBSEQUENT TO JUNE 30, 1865.

* * * * *

"Treasury Department,
August 4, 1865.

"Sir: It is expected that you will collect *all* cotton,

noted on the records of the rebel agents as belonging to the so-called confederate government, and leave all claims thereto to be decided by the Court of Claims, as the law directs.

Respectfully,
H. McCulloch,
Secretary of the Treasury.

Harrison Johnston, Esq.,
Assistant Special Agent, Columbus, Mississippi."

[P. 149:]

"Rules Governing the Collection of Captured Cotton.

Treasury Department,
August 18, 1865.

"The irregularities, confusion, and conflict growing out of the collection and movement of captured cotton without an organized system of action governing the whole subject, renders an immediate reform necessary. I have therefore determined to establish the following rules, governing the first, second, third, fourth, eighth, and ninth agencies:"

* * * * *

[P. 150.]

"8th. In any case where cotton or other property is moving in the hands of private parties which a supervising agent has satisfactory reason to believe was captured from the late so-called Confederate government, and has been stolen or otherwise wrongfully taken, he will detain the same and examine fully into the case, and if he shall be satisfied by the proofs submitted that the property was captured, then he shall seize and forward it as captured property; but if he shall be satisfied that it was not so captured, then he will release it to the party from whom it was taken."

* * * * *

[P. 152:]

"Treasury Department,
October 20, 1865.

"Sir: I have received your letter of the 10th instant, calling my attention to the subject of collecting cotton which was subscribed to what was known as the 'Produce Loan of the Confederate States,' and giving me your general views in relation to it.

"The Department does not concur fully in the views entertained by you. The rule it has adopted is, that where the descriptive lists of property owned by the late so-called Confederate States, captured from or surrendered by its military or civil agents, show property owned or controlled by it, such property, if found as stated, should be collected and forwarded by agents of this Department, leaving all questions of right, title, or value of consideration received, to be adjusted by the Court of Claims, to which claimants of said property are referred by the act of Congress on the subject."

* * * * *

Very respectfully,
HUGH MCCULLOCH,
Secretary of the Treasury.

Joseph R. Dillin, Esq.,
Supervising Special Agent.

APPENDIX "F."

Civil War and Reconstruction in Alabama, by Walter L. Fleming, Professor of History in the West Virginia University. Published New York, 1905, by the Columbia University Press.

[This work supports its statements by citation of many authorities, official and private, Federal and Confederate, not here reprinted. Other details, equally pertinent, are contained in the same chapter, but not quoted here. Reference is asked to the book itself.]

CHAPTER VI.

"Confiscation and the Cotton Tax."

* * * * * *

[P. 290.]

Cotton Frauds and Stealing.

* * * * * *

"On much of the cotton subscribed to the Confederate Purchase Loan the government had advanced a small amount to the owner and allowed him to keep it. In many cases no payment had been made. The farmer considered that the cotton still belonged to him, but that the Confederacy had a claim on a part of it. The records kept were imperfect, and few persons knew just what was Confederate cotton and what was not. Much of the cotton subscribed had been destroyed or sent to government warehouses in Selma, Mobile, Montgomery and Columbus, where it was burned in April and May, 1865. Of course each man considered that the cotton destroyed was Confederate cotton and that all left was private cotton. In most cases the claim of the government was very shadowy. Where cotton was still in the hands of the planter, private and government cotton could not be distinguished. The records did not show whether a man had kept or delivered the cotton he had subscribed to the Produce Loan. The agents proceeded upon the assumption that he had kept it, and that all he had kept was government cotton. No proof to the contrary would convince the average agent. Secretary McCulloch said, 'I am sure I sent some honest

[P 291]

cotton agents South; but it sometimes seems very doubtful whether any of them remained honest very long.' It was said that Secretary Chase had foreseen the trouble that would result if the cotton were confiscated and had proposed to leave all cotton in

the hands of the former owners who then held it. When the records were certain, the cotton might be confiscated; but in most cases there were no correct records. Such a policy would have been generous and magnanimous, and would have had a good effect. The plan of Chase was not accepted, and a carnival of corruption followed. In August, 1865, President Johnson wrote to General Thomas, 'I have been advised that innumerable frauds are being practiced by persons assuming to be Treasury agents, in various portions of Alabama in the collection of cotton pretended to belong to the Confederate States Government.' "

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 184.

ROBERT H. THOMPSON, Administrator of the Estate of JOHN H. THOMPSON, Deceased, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

The case was dismissed in the lower court, following the Whitfield decision, 92 U. S., 165.

Facts are stated elsewhere and herein discussion will be limited to the question of title.

SYLLABUS.

I. The sale was an executory contract, ... 2
II. The contract was invalid and void, ... 7

III. Pardon restored confiscable and forfeitable rights,... 13

I. Executory Contract.

The times, public questions, and surrounding circumstances may be considered.

The financial affairs of the Confederacy, the economic condition of the Southern States, and Thompson's environment, show the intention controlling the contract was executory.

The 8 per cent $15,000,000 ten-year bond loan under the act of February 28, 1861, secured by an export tax of one-eighth of a cent a pound on cotton, absorbed most of the specie in circulation, which was sent abroad for war supplies.

Under the act of May 16, 1861, bonds for $20,000,000 were issued.

Under the act of August 19, 1861, $80,000,000 in treasury notes were issued, followed by $150,000,000 more under the act of April 18, 1862, and following the act of September 23, 1862, the lid flew off and the limit was the available supply of printing paper.

No provisions were made to meet principal or interest of either bonds or notes, except the $15,000,000 in bonds issued under the act of February 28, 1861, while States, towns, corporations, factories, banks, trading companies, etc., vied with each other in issuing credit paper and these various issues of bonds, notes and credits flooded the country with irredeemable paper.

Hamilton had urged upon Robert Morris in 1779 the propriety of the Government taking over the crops of the country through loans secured by the produce, all exporting having been tied up by the enemy vessels, (Sommer, Finances Am. Rev). Mississippi entered upon a somewhat similar policy in her law of December 19, 1861, issuing

treasury notes up to $5,000,000 on pledged cotton and these notes were receivable for all dues to the State and counties, (*infra*), except the military tax and up to the close of the war they rated highest of all paper moving in current affairs.

North Carolina followed with $5,246,336.25, and then Texas, while a like proposition was vetoed in Louisiana.

An act was passed May 16, 1861, by the Confederate Congress for the exchange of bonds for supplies raised by the planters.

High officials, backed by the press (Chas. Courier, July 4, 1861, and January 3, 25, 31, 1862), urged that the plan of the three above mentioned States be adopted by the Government, but the Produce Loan Act of April 21, 1862, to use unsecured bonds only to buy cotton instead of treasury notes based on the purchased produce, obtained preference; used as first to ~~produce~~ procure such supplies for the army as were produced by the planters, but soon to become the vehicle for purchasing vast quantities of cotton. (Confed. Arch. Reports to Memmimger, January 16, 1862, and January 9, 1863; Bullock, Secret Serv. II, 225.)

From all sides came urgent advice to buy cotton outright with an issue of treasury notes based on the purchased cotton, which, with the demand in Europe for the staple, would afford a good and stable currency. (N. O. Price Current, June 22, 1861; February 26, March 3, 1862; Confed. Arch., Blackbourn to Memmimger, October 2, 1862; DeBow's Rev. October and November, 1861; Pollard's Davis, 178-9; Rich. Enq., November 4, 1861.)

During the winter of 1862-3, when the Act of February 20th was passed, and when Thompson sold his cotton (*infra*), the Government was urged to buy the entire crop of cotton outstanding in the hands of the planters. (Petersburg Express, January 7, 1863; Rich. Enq., January 20, April 6, 1863.)

In these matters are seen efforts to induce the Congress to buy cotton outright with treasury notes secured by the cotton and the refusal of Congress to adopt such policy, but to contract for it with unsecured bonds.

Treasury notes, at the option of the holder, were convertable into bonds, but the bonds were denied that reciprocating privilege.

The act of September 23, 1862, provided:

> "the bonds and certificates of stock to be issued in preference in all cases where they can be used,"

which, added to the foregoing, shows it was the intention of the Congress that the bonds should remain in first hands and in the contracts with the planter that he should hold his till after the close of the war.

Millions of treasury notes bore the legend: "paid six months after the ratification of a treaty of peace between the Confederate States and the United States," while all the bonds bore the same implied condition.

Some of the contract cotton near the seaboard was hypothecated in the transaction with the Erlanger Syndicate (Bigelow, France and Confed. Navy), but the bulk of it remained back on the plantations free from pledges. This is evidenced by the fact that in every Mississippi case reported by the Secretary of the Treasury, in whose keeping are the Confederate records relating to these contracts, and reports on which are found among the files of the Court of Claims, there is attached to each a blank form for transfer, and not one is filled in. This is a fact as to the report in the Thompson case, see exhibit. A reason was that Mississippi cotton was not accessible to an exit for blockade running, such as Wilmington, N. C., and Brownsville, Texas, and no one cared for it as a risk, coupled with the well-

known intention of the parties that it was to be left on the plantations till the close of the war.

The military campaign of 1862 seemed a success; Bragg was successful in Kentucky, the Peninsular Campaign was successful and the Second Battle of Bull Run had been fought. The leaders had no delusions but to the people throughout the South victory seemed in sight, so, promising a value to cotton held on the plantations without a market, agents, coming to obtain subscripions to the produce loan, that promised a relief to the planters, were well received, though, at the same time, there was the threat behind the offer like that of General E. Kirby Smith, when he issued his proclamation threatening to impress one-half of the cotton in Texas, where there was an exit through Brownsville, if subscriptions were not forthcoming. (S. D., 987, 62d Cong., p. 313.)

Some sold for profit.

Thompson knew of the financial affairs of the Confederacy and the economic conditions in the Southern States; he saw the country flooded with unsecured paper currency and other paper passing as such, yea, hundreds of millions of it. No prices were fixed for anything and a crash was inevitable. He knew cotton was the same as gold out in the world beyond the Confederate States, while his, as long as held by him on his plantation, was always in danger, from destruction by the Federals or Confederates, capture, fire, or wear and tear.

United States bonds were at 63.7 and notes at 64.4, while Confederate bonds and notes were at 32.1 and 29.0. (New York market reports; N. O. Price Current; DeBows Rev.; Confed. Arch.)

He was offered 15 cents a pound for his cotton in 8 per cent 5-20 bonds, which, according to the Richd.

Sentinel, copied into the Charleston Mercury, July 18, 1863, had a wonderful prospective value if the Confederacy succeeded.

He knew some cotton got through the blockade at Wilmington and Brownsville, but none got out from Alabama, Mississippi or Louisiana, so he was safe to know that he would hold his till the blockade was lifted, and that would mean gold for the bonds or cotton.

He signed the bill of sale at the time he received the bonds, issued under Sec. 1 of the Act of Fberuary 20, 1863, having prior to that subscribed for them under the terms of the Act of April 21, 1862.

If he was to receive no more than the bonds at their then value of 32.1, while cotton was selling in England at 48 cents a pound, he knew he would be receiving, in unsecured and doubtful paper, too small a value for his cotton to warrant release of his vendor's lein.

He was not compelled to sell from pressure arising from his own needs, for, living on his plantation where he raised everything to supply his wants, even his clothes, he needed nothing from the outside world as long as the war lasted.

The intention of the parties governs the contract, Pratt vs. Canton Cotton Co., 51 Miss., 470.

The intention of the parties may not be expressed on the face of the contract, but an agreement in fact, creating an obligation, is implied from the facts, and reason and justice create the implied contract, 2 Black. Comm., 443; Hertzog vs. Hertzog, 29 Pa., 465; People vs. Speir, 77 New York, 144; Wickham vs. Weil, 17 New York, 518.

Honor, the very foundation of Southern life and character, forbade the possibility of the leaders playing the "gold-brick game" on their own people.

The record in the Whitfield case shows that when the United States authorities came for his cotton a dispute arose

as to the title, when, after a discussion, Whitfield delivered his cotton with his own teams, completing his contract. This fact was in the minds of the Court when that decision was rendered.

The times, the public questions of the day, coupled with the surrounding circumstances show the meeting of the minds of all parties in the mutual understanding that the cotton should remain in the possession of the planter as security for the bonds until the blockade was lifted, when the bonds would have a value commensurate with that of the cotton.

II. Contract Invalid and Void.

A new State is declared to be one of the United States and is admitted into the Union, 5 Stat. L., 50, but after the war the seceding States were declared to be entitled to representation in Congress, 14 Stat. L., 429. Mississippi was never out of the Union and all her laws not in conflict with the Constitution were enforceable throughout the United States. Thompson was always a citizen of the United States and entitled to the protection of the Constitution, with its privileges, Texas vs. White, 7 Wall., 700; White vs. Hart, 13 Wall., 651; Huntington vs. Texas, 16 Wall., 413; Home Ins. Co. vs. United States, 22 Wall., 99.

The Ordinance of Secession, Sec. 3, of the legally called State Convention of Mississippi, January 15, 1861, recognized the Code of 1857 and it continued the law of the land.

Sec. 2, Ch. 44, Code of Miss., 1857, provided that a sale of goods to be valid must be for a "consideration deemed valuable in law" and such sale must be recorded in the county where the property is located if possession is not given. This is the old law of 29th Chas. II, carried into their statutes by most of the States.

Thompson retained possession of his cotton, no record of the sale was made in Copiah Co., Miss., and the consideration was not valuable "in law." The consideration was bonds that had no value "in law" because they were issued by

> "An assemblage without corporate power to take, hold or convey a valid title to property, real or personal,"

says the Court of Claims in the Sprott case (10 C. C. I.), and this Court in the same case on appeal, 22 Wall, 459, ruled:

> "It left no laws, no statutes, no decrees, no authority which could give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protect its existence."

In line with the Sprott case are: Hickman vs. Jones, 9 Wall., 197; Hanaur's case, 12 Wall., 342; Knox's case, 12 Wall., 326; Williams vs. Bruffy, 96 U. S., 176; Ford vs. Surget, 97 U. S., 595.

The Court held in the Sprott case that a sale of cotton by the Confederate Government was invalid and void because of the impossibility of such a party making a legal contract, wherefor, the logical deduction is that a sale to the Confederate Government was equally invalid and void.

The view of the matter taken at the time by the Administration was expressed by the Secretary of the Treasury in his letter of January 23, 1866, to Treasury Agent Mellen at New Orleans about this very cotton, wherein he says:

> "The United States does not base its claim to such property as the assignee or successor-in-law of the so-called Confederate Government. In fact, this Government denies that that organization, as a government or

body corporate, could lawfully acquire, possess, or convey any description of property." (Treasury Instructions, printed 1872, p. 153.)

Both arguments are absolutely sound.

Lyon v. Huckbee, 16 Wall., 414 and Titus v. United States, 20 Wall., 476, are cited in the opinion in the Whitfield case, 92 U. S., 165, as instances where it was held that the Confederacy could hold real estate and the argument was made that, if real estate, so much the more so, personal property; but the distinction making the two cited cases inapplicable here, and the error of the argument, do not appear on the surface.

Belligerent rights were allowed the Confederate States in an exchange of prisoners and other humane rights (Smith v. Stewart, 21 La., 67; Yost v. Stout, 4 Cold. Tenn.), (205), and as is shown in the two cited cases, the right to hold real estate as a war measure pure and simple, but nowhere and at no time did the United States admit the right of the Confederate States to enter into lawful commercial transactions. The military government could acquire real estate on which to erect a fortress, for instance, or factory for turning out military supplies, and the civil branch of the government could acquire real estate on which to house its civil force necessary for carrying on the war, but to engage vast amounts of cotton on the pretense of relieving the distress of the planters who were without a market for their cotton, and thereby build up a credit for after use, was a transaction in business and commerce and not a belligerent right the United States could admit, or ever did admit.

The Court, in Thomas vs. Taylor, 22 Wall., 479, affirming a decision of the Supreme Court of Mississippi, which had held the treasury notes issued by the State on pledged cotton were issued in aid of the rebellion and therefore in-

valid and void, showed that all acts in aid of the rebellion were illegal and void, citing the cases of Buckman vs. Smith, 43 45 Miss., 97; Mister vs. McLean, 43 Miss., 268; Lawson vs. Jeffries, 47 Miss., 686. In Davis vs. Perdicaris, 96 U. S. 195 the Court holds the principle is so settled that it is axiomatic.

It will not be disputed that Thompson's sale was an act in aid of the rebellion.

An illegal agreement will not be enforced, and hence, is not a contract according to the meaning of a contract. The illegality may be found in the matter of the consideration or of the promise as expressed in the agreement, or it may be found in the purpose to which the agreement, though legal in expression, is applied. In either case the agreement is void, Odeneal vs. Barry, 24 Miss., 9; Adams vs. Rowan, 8 Miss., 556. 624

The contract, based on Confederate bonds, was void *when made,* on the ground of public policy, Bethel vs. Demaret, 10 Wall., 537; Bank West Tenn. vs. Citizen's Bank, ib., 10; 14 Wall Sevier vs. Haskell, ib., 12; Jacoway vs. Denton, not reported. Also Delmas vs. Ins. Co., 14 Wall., 665.

To hold the Thompson sale valid would be holding valid an agreement inimical to the United States, which is contrary to the laws of the United States, Pollard vs. Hagan, 3 How., 217, 225; United States vs. Vaca, 18 How., 556.

Senate Ex. Doc. 23, 43d Cong., 2d Ses., was before Congress when the Act of 1911, under which this case was brought, was passed, and the reference in the law to "owners" was to those from whom the cotton had been taken after June 1, 1865, shown in that document as the owners whose property had been taken. From this document, p. 30, it appears that there were taken, shipped, sold, and the net proceeds thereof placed in the Treasury, cotton from "J. H.

Thompson, Copiah Co., Miss., October 28, 1865, 43 bales, gross proceeds $5,157.28, net $3,444.68."

This is the lot of cotton in litigation. Thompson did not in law part with his title, but can he plead the illegality of the contract to his own advantage?

The Mississippi Courts hold that a deed having no validity can not be made the basis of an estoppel, Fairly vs. Fairly, 34 Miss., 18.

But further.

Pardon is an act of grace that flows from the sovereignty of the people speaking through the President. Speaking in his sovereign capacity, representing the sovereignty of the people, the President of the United States, December 25, 1868, 15 Stat. L., 711, published and declared:

> "I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with the restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance therewith."

In the Garland case, 4 Wall., 380, the Court held:

> "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon

> conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

And in the Carlisle case, 16 Wall., 151:

> "All (decisions heretofore rendered) have agreed that the pardon not merely releases the offender from the punishment prescribed for the offender, but that it obliterates in legal contemplation the offense itself."

And, page 153:

> "After these repeated adjudications, it must be regarded as settled in this Court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims."

Pardon and amnesty wiped out Thompson's disloyal act and obliterated in legal contemplation the offense itself. It made a new man of him and obliterated the past. It gave him the legal right to say he never made a sale of his cotton to the Confederate Government. It, coupled with the present enabling act, exempted him from all harmful consequences flowing from his disloyalty, including the ban on his pleading the illegality of the sale to his present advantage.

If the Courts of the United States could hold a sale like Thompson's was valid, that a *de facto* government existed, with power and right to enter into a contract as in this case appears, then, as the United States utterly destroyed that government, it behooves and the United States is bound to make good on the bonds. Such is the rule of international law, Moore, Vol. I, 334, 336, 341-2-3, 351 and 360, but we

shall have to draw the Fourteenth Amendment to the Constitution across the Law of Nations. When the American people adopted that amendment, declaring Confederate bonds shall be held illegal and void, they promised Thompson a return of his cotton then held in trust, by the United States, *infra,* foreknowing the pardon to come and its effects, and conscious of that promise, with a full knowledge of all the facts, Congress passed the present law.

III. Confiscable and Forfeitable.

Sections 1 and 6 of the Act of March 12, 1863, 12 Stat. L., 767, declared cotton should not be held to be contraband of war and therefor forfeitable on capture.

In the Deikleman case, 92 U. S., 526, the Court declares what is contraband depends on circumstances, and money does not necessarily partake of that nature unless in hostile use intended to procure war supplies.

So it might be with cotton. When in transit intended for exchange for war supplies, it might partake of that nature and be subject to forfeiture on capture, but when stored on the plantation, unpledged, a mere commercial commodity, it can not be held to be contraband of war, as is shown in the Act of 1863, *supra.*

In the Armstrong case, 6 Wall., 768, the Court held that when property had knowingly, even, been employed in aid of the rebellion, and was for such offense forfeitable, general pardon and amnesty relieved the owner of the offense and freed the property from forfeiture.

Thompson's cotton was subject to confiscation and forfeiture under the Act of July 17, 1862, 12 Stat. L., 592, because it had been dedicated by him to a disloyal purpose, but the law was stayed by the Act of March 12, 1863, 12 Stat. L., 767, providing that when taken it should be sold

and the net proceeds placed in the Treasury, there to await certain things to happen, besides which, no legal steps were taken to confiscate and forfeit it prior to the pardon and amnesty, *supra*, as required by the Act of July 17, 1862.

In the Klein case, 13 Wall., 137, the Court held:

> "It will thus be seen that, except as to property used in actual hostilities, as mentioned in the first section of the Act of March 12, 1863, no titles were divested in the insurgent States, unless in pursuance of a judgment rendered after due legal proceedings."

In the Klein case the Court holds the United States constitutes itself trustee for the owners of the cotton fund till such time as Congress shall finally dispose of the matter.

In the Padelford case, 9 Wall., 538, the Court held the Act of March 12, 1863, was remedial in its nature, as shown in the Anderson case, *ib*, 56, "requiring such a liberal construction as will give effect to the beneficient intention of Congress." This applies with equal force to the law now under consideration. It was the intention of Congress, in enacting the law of 1911, to redeem the promise the people made when the Fourteenth Amendment was adopted, the promise made at Appomattox, and to wipe out forever the *lex talionis* of the harsher day.

SARGEANT PRENTISS KNUT.
Of Counsel.

May 10, 1917.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ROBERT H. THOMPSON, ADMINISTRATOR OF John H. Thompson, deceased, appellant,
v.
THE UNITED STATES.

No. 184.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment sustaining the demurrer of the Government and dismissing the petition. It is one of a class of cases in which the entire amount involved is approximately two million dollars, and is brought under section 162 of the Judicial Code, being the act of March 3, 1911, entitled "An act to codify, revise, and amend the laws relating to the judiciary."

The allegations in the petition are that John H. Thompson, deceased, was a resident of Copiah County, Miss., and on April 28, 1863, executed a bill of sale (Rec. 1) to the Confederate States of America for 72 bales of cotton then on his plantation and received

therefor bonds of the Confederate States Government in the sum of $5,500. The cotton remained in the possession of the said Thompson until after June 30, 1865, when 43 bales of it was taken over by the United States agents under the provisions of the act of Congress approved March 12, 1863, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States" (12 Stats., 820) and acts amendatory thereof, and sold, and the net proceeds in the sum of $3,644.60 were placed in the Treasury of the United States. For this amount the administrator brings suit to recover.

Appellant's position is that the Confederate States of America having ceased to exist, and its bonds having become worthless, the consideration advanced to appellant's intestate failed while the deceased having the said cotton in his possession had a vendor's lien upon the same for its value, which gave him the right to recover under said section 162.

The Government maintains that the case is on all fours with *Whitfield* v. *United States*, 92 U. S. 165, wherein this court decided that Whitfield in executing a bill of sale for cotton to the Confederate States and receiving its bonds in return therefor had parted title; that the United States took it as captured property, and hence Whitfield could not recover against any moneys in the United States Treasury received from the sale of said cotton. Again, while the general amnesty act had purged Whitfield of his disloyalty, it did not change the

status of his disloyal act in assisting the Confederacy by the sale of the cotton to it. Hence the contract being illegal, the court would leave the parties where they were, and appellant could not recover.

BRIEF OF ARGUMENT.

1. The case at bar is foreclosed by the decision in *Whitfield* v. *United States*, 92 U. S. 165.

2. Section 162 of the Judicial Code did not affect the status of appellant's position so as to give him any forum for the determination of his alleged claim.

ARGUMENT.

I.

The case at bar is foreclosed by the decision in Whitfield v. United States, 92 U. S. 165.

Stripped of all of the verbiage and sophistry with which counsel for appellant surrounds this case, it can be said to be foreclosed by the decision in *Whitfield* v. *United States*. (92 U. S., 165.) The facts in the case at bar are on all fours with those in that case. Whitfield sold his cotton to the Confederate States and accepted its bonds in return. The cotton was left in his possession until September 1, 1865, when it was seized by the Treasury agents of the United States, taken to New York, sold, and the net proceeds deposited in the United States Treasury. Whitfield's claim was defeated on two grounds. The first was that he had parted with his title, and that when the cotton was seized it was taken as captured

property, and that he had no interest in it whatsoever. The court says (p. 170):

> Whitfield's sale, in this case, was not on credit, but for bonds which passed from hand to hand as money. The transaction, in this respect, was not different from a sale to the United States for any of their public securities payable at a future day. The sale was complete when the bonds were accepted in payment. The title then passed to the Confederate States without a formal delivery. From that time, Whitfield ceased to be the owner of the cotton.

From the foregoing quotation it is established that upon similar facts in the case at bar Thompson was not the owner after the sale to the Confederate States, and therefore, under section 162 could not come within its jurisdictional requirements, since that section distinctly refers to "owners" of cotton. It says:

> * * * and the Secretary of the Treasury shall return said net proceeds *to the owners thereof* on the judgment of the said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding.

The second proposition on which the claim was defeated was that although Whitfield had been pardoned and restored to citizenship by the amnesty act, this did not purge his disloyal act in supporting the rebellion by the sale of cotton and the taking

over of bonds in return therefor. The court says (*supra* 170):

> The claim, then, that he had the right to retain the possession of the cotton until the purchase money was paid, because of the insolvency of the Confederate government, is not applicable to the facts established by the evidence, as the purchase money had been paid before the insolvency. But, if this were otherwise, it is not easy to see how his claim, growing out of his illegal contract as it does, can be enforced against the United States in the Court of Claims.

Again:

> When Whitfield, therefore, sold his cotton to the Confederacy, and took their bonds in payment, he contributed directly to the means of prosecuting the rebellion. He says in his petition, it is true, that his sale was not made to aid the rebellion; but the purchase was clearly for that purpose, and no other. This he could not but have known. Under such circumstances, "he must be taken to intend the consequences of his own voluntary act."

It is difficult to conceive how appellant has the hardihood to attempt to circumvent the Whitfield case; and yet he dares to do so by saying that section 162 of the code is intended to nullify the effect of that case. While asserting that the Whitfield case forecloses all matters herein, we shall meet this position of appellant.

II.

Section 162 of the Judicial Code did not affect the status of the appellant's position so as to give him any forum for the determination of his alleged claim.

It has been said that appellant could not qualify under section 162, because under the Whitfield case he was not the owner of the cotton, having lost title to the cotton when he sold it to the Confederacy. There is nothing in section 162 which gives any indication of the intention on the part of Congress to nullify the Whitfield case. If, after all of the bombardments that Congress had received from southern cotton owners or their descendants, on their right to recover for cotton taken, it had intended to set aside the Whitfield case, let down the bars and grant a forum to those who sold cotton to the Confederacy in order to aid the rebellion, surely the debates in Congress would have revealed this. (Congressional Record, vol. 46, pt. 3, p. 2177, 61st Cong., 3d sess.) Yet reference to the same does not disclose that either the Whitfield case or the subject "Confederate cotton" was ever discussed or brought to its attention. It would have been very easy to have written into section 162 of the code language intended to nullify the Whitfield case.

Appellant, however, asserts that section 162 of the code must have been enacted for the purpose of giving relief to those who had sold their cotton to the Confederacy because "the cotton taken after

June 1, 1865, was necessarily, in general, cotton which had been the subject of sale to the Confederacy." (Appellant's brief p. 34.) This, however, is contradicted by the fact that in nearly every case counsel for appellant has brought in the Court of Claims to recover for cotton under section 162 it has been alleged that it was not Confederate cotton. As for example, in the following cases:

Harvey v. *U. S.* (No. 30916), 77 bales;
Robinson v. *U. S.* (No. 31182), 112 bales;
Moore v. *U. S.* (No. 30895), 200 bales;
The Georgia Importing and Exporting Co. v. *U. S.* (No. 31062) 2,500 bales.

In each of these cases the plaintiff insisted that the particular cotton had not been sold to the Confederacy, and now counsel who represents these several plaintiffs in the court below argue that all the cotton in general represented by money in the Treasury was Confederate cotton. Of the few cases that have been brought to the attention of the Court of Claims out of the many that are pending, several thousand bales of cotton are included in the claims which owners deny were ever sold to the Confederacy. It is undoubtedly for the benefit of such owners that section 162 was enacted.

Again, appellant argues in substance (brief 34) that Congress had upon four different occasions provided executive or judicial remedies for those having cotton taken by the Government during or after the war, and these executive and judicial remedies in-

cluded all classes save those who had sold their cotton to the Confederate Government; hence all other classes having been given a remedy the act of March 3, 1911, must have been enacted for the purpose of aiding those who had sold to the Confederacy, otherwise it was meaningless legislation. To this the Government answers that Congress did not provide four times for the relief of owners whose cotton had been taken after the war, nor did it ever provide a judicial remedy until the act of March 3, 1911.

The act of March 12, 1863, entitled "An act providing for the collection of abandoned and captured property and for the prevention of frauds in insurrectionary districts within the United States" certainly provided no relief for cotton planters. On the contrary it provided for the seizure and appropriation of their property. It contained a proviso that loyal owners might recover upon making requisite proof within two years after the close of the war, which date was the 20th of August, 1868. This excluded those who were giving aid to the Confederacy by selling their cotton to it, and was an indirect blow at those who had been disloyal.

The act of March 30, 1868 (sec. 1, 15 Stat. p. 251), turned all of the moneys received from the sales of captured property back into the United States Treasury, thereby taking away from the Secretary of the Treasury the power to pass upon claims of cotton owners which he had hitherto exercised.

The act of May 8, 1872 (sec. 5, 17 Stat. 134), empowered the Secretary to pass upon claims for cotton seized after the 30th day of June, 1865, for a limited period of six months. Under this statute claims amounting to $13,600,000 were filed, and yet when the six months had expired the Secretary had only allowed $188,168.51. (Appellant's brief 35.)

There was no other relief granted to owners of cotton until the act of March 3, 1911; yet counsel for appellant have the audacity to say that (brief 36):

> A second judicial remedy was the right to appeal to the Court of Claims upon the rejection by the Secretary of the Treasury under the act of 1872, a right fully recognized by the rules later laid down by this court in *Medbury* v. *United States*, 173 U. S. 492.

Had cotton owners had the right to appeal under the act of 1872 the court records would undoubtedly have indicated this; whereas out of the numerous cases rejected by the Secretary under this act not one was ever appealed. It is a far cry to the Medbury case—one so familiar to this court and so totally inapposite that discussion of it would be superfluous. It was tried in 1880 and the decision of the court held that no appeal could be taken from the decision of the Secretary involving the question of fact therein, which question of fact had nothing whatsoever to do with cotton.

Hence it will be seen that, aside from the illogical position taken by appellant as to the reason for the passage of the act of March 3, 1911, his historical

allusions are incorrect. The conclusion of the whole matter is that Congress finally responded, by the act of March 3, 1911, to the appeals of southern constituents who for years had desired a judicial forum in which to determine their claims for cotton taken where the same had not been sold to the Confederacy. This did not include appellant's intestate.

Respectfully submitted.

HUSTON THOMPSON,
Assistant Attorney General.

O